87-1829

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PRE-SCHOOL OWNERS ASSOCIATION OF ILLINOIS, An Illinois Not-For-Profit Corporation; BURTON D. MILLER; and CROSSROADS CAMPUS, INC., An Illinois Corporation,

Appellants,

vs.

STATE OF ILLINOIS, DEPARTMENT OF CHILDREN AND FAMILY SERVICES; and GORDON JOHNSON, Its Director,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS, JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Illinois Child Care Act, which exempts from licensing and regulation certain categories of day care center programs by reason of criteria neither demonstrably nor theoretically related to health, safety and welfare, creates an unreasonable classification in contravention of the Fourteenth Amendment rights of plaintiffs' day care centers to equal protection of the law.

2. Whether an Illinois statute which generally exempts day care centers operated by religious institutions from all licensure and regulatory requirements violates the Establishment Clause.

3. Whether §407.10(c) of the Illinois Administrative Code, which requires the termination of an employee accused of child abuse solely on the basis of an accusation, violates due process of law.

4. Whether the regulations contested by plaintiffs are so vague and uncertain as to offend due process of law.

THE PARTIES

The names of the parties to the proceeding are contained in the caption.[1]

[1] Crossroads Campus, Inc. has no parent company, subsidiary or affiliate. Pre-School Owners Association of Illinois is an Illinois not-for-profit corporation. It has no parent company, subsidiary or affiliate.

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OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 119 Ill.2d 268, 518 N.E.2d 1018 (1988). (See Appendix, pp. 37a-58a).

The decision of the Circuit Court of Cook County, Illinois is not reported. (See Appendix, pp. 39a-66a)

JURISDICTION

The judgment of the Supreme Court of Illinois, reversing the trial court's summary judgment order, was entered on January 19, 1988. (See Appendix, pp. 67a-106a).

A notice of appeal to this Court was duly filed in the Supreme Court of Illinois on April 13, 1988, pursuant to S. Ct. R. 10.3. (See Appendix, pp. 168a-170a).

This appeal is being docketed in this Court within 90 days from entry of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

STATEMENT OF THE CASE

Pre-School Owners Association of Illinois, Inc. ("Pre-School"), an Illinois not-for-profit corporation, of more than 100 members, was organized to foster and encourage pre-school education. The Illinois Department of Children and Family Services ("DCFS") was authorized, pursuant to the provisions of the Child Care Act of 1969, to prescribe minimum standards to be applied to day care programs.

As enacted, the Child Care Act of 1969 (the "Act") included exemptions only for day care centers operated by public schools and private elementary school systems, continuing the coverage of child care as promulgated by the legislature in the original Child Care Act. Ill. Rev. Stat., Ch. 23, §§2301-2329 (1957) (repealed); Ill. Rev. Stat., Ch. 23, §§2211-2230 (1969). Effective January 1, 1982, the Act was amended to exclude from the

regulatory scheme, among others, day care programs operated by a school which is registered with the State Board of Education, and which is recognized or accredited by a recognized national or multi-state educational organization or operation which regularly recognizes or accredits schools and special activities programs conducted by civic, charitable and governmental organizations. Ill. Rev. Stat., Ch. 23, §2212.09(b) and §2212.09(g) (1983). Under the latter exemption, park district day care programs are commonly conducted without state regulatory oversight. Finally, in 1982, the Act was amended to add an exemption for day care programs operated by churches or religious institutions, which became effective January 1, 1983.

On May 3, 1985, the plaintiffs filed an amended complaint, asserting that §2.09 of the Act violated the Equal Protection and Establishment Clauses; that §407.10(c) of DCFS's regulations deprived the plaintiffs of their rights to equal protection and due process, and that the language of other subsections of Part 407 of the DCFS regulations rendered said regulations void for vagueness. The defendants filed an answer on November 1, 1985.

After extensive briefing by the parties, the circuit court entered a partial summary judgment, granting judgment to plaintiffs on the counts alleging that §2.09 of the Act violated the Equal Protection and Establishment Clauses, and that the subsections of Part 407 contested by plaintiffs deprived plaintiffs of due process of law, and were void for vagueness, as well.

The Illinois Supreme Court reversed the judgment of the circuit court. The Illinois Supreme Court found that the exemptions provided in the statute in question did not deny equal protection or constitute special legislation, finding them rationally related to the State's legitimate interest, but the Court was unable to determine with any degree of certainty what legitimate interests were served by the exemptions. The Court also held that §2.09(i) did not violate the Establishment Clause.

The plaintiffs-appellants directly appeal the order of the Supreme Court of Illinois to this Court.

REASONS REQUIRING PLENARY CONSIDERATION

I. CHILD DAY CARE REGULATION SHOULD BE APPLICABLE TO ALL CHILD DAY CARE CENTERS.

All 50 states have regulatory schemes governing child day care, purportedly to assure minimum health and safety standards for children cared for away from their homes. Yet, 33 states exempt public, private and/or parochial schools from child day care regulation. (See Appendix, pp. 1a-9a). If day care regulation is necessary to ensure the health, safety and welfare of children placed in child day care centers, is it in the best interest of these children for legislatures to exempt an increasingly larger proportion of day care centers from required compliance with minimum standards?

States have a compelling and overriding interest to protect the health and safety of children which militates in favor of broad-based enforcement of health and safety regulations. Whether legislation, which relieves categories of day care centers operated by powerful special interest groups from compliance with minimum health and safety standards is Constitutional presents a substantial federal question, requiring plenary consideration.

II. THE ILLINOIS COURT'S DECISION UPHOLDING RELIGIOUS INSTITUTION EXEMPTION WAS ERROR.

This Court has established a three-part test for assessing whether legislation can be sustained against an establishment clause challenge, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and to overcome a judicial challenge, an exemption must pass all three tests, namely:

1. It must have a secular legislative purpose;

2. Its primary effect must not enhance or inhibit religion; and

3. It must have no potential for fostering excessive governmental entanglement with religion.

Lemon v. Kurtzman, 403 U.S. 602, 612-613; U.S. Const., Amend. I.

A. *Section 2.09(i) of the Illinois Child Care Act does not have a Secular Legislative Purpose.*

The Illinois Supreme Court, rather than finding a secular legislative purpose, chose to speculate as to the purpose of the Illinois General Assembly, without benefit of any legislative history, or precatory material in the statute. First, the Court said that "the legislature could have properly found that the need for regulation by DCFS was more urgent in some areas than in others ..." *Pre-School Owners Association v. Department of Children and Family Services*, 119 Ill.2d 268, 518 N.E.2d 1018, 1024 (1988). In so speculating, the Court ignored that from 1957 through 1983, day care centers operated by religious institutions were regulated. Ill. Rev. Stat., Ch. 23, §§2301-2329 (1957)(repealed); Ill. Rev. Stat., Ch. 23, §§2211-2230 (1969). Therefore, the step-by-step justification, usually considered upon a challenge under the Fourteenth Amendment, was inappropriate and inapplicable. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Chicago National League Ball Club v. Thompson*, 108 Ill.2d 357, 483 N.E.2d 1245 (1985). As was pointed out by the Kansas Supreme Court, a day care center cannot suddenly "get religion" and object to licensing, when it has been licensed and regulated in the past without objection. *State of Kansas ex rel. Pringle v. Heritage Baptist Temple, Inc.*, 693 P.2d 1163 (Ka. 1985), to the same effect, *See State of North Carolina v. Fayetteville Street Christian School*, 258 S.E.2d 459 (N.C. 1979).

As to the supposed secular purpose, the Illinois Supreme Court said that the legislature may have believed the religious institution exemption would tend to "***reduce***" state involvement in matters of religion. Although a secular legislative purpose can be to alleviate "significant governmental interference with the ability of religious organizations to define and carry out their religious mission," *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. __, __, 107

S. Ct. 2862 (1987), *reducing* governmental interference does not rise to alleviation of *significant* governmental interference. (See Section II(C), page 6). This Court, we believe, did not broaden the definition of a secular legislative purpose to validate *any* law which exempts activities of religious organizations from governmental regulations. In *Amos*, plaintiffs submit this Court's intent was to protect the autonomy of religious organizations in ordering their internal affairs.

In contrast, the Child Care Act does not threaten the autonomy of religious bodies in internal governance matters. If the Child Care Act were applied to sectarian day care centers, this would cause no hindrance to the decision-making functions of the religious bodies sponsoring the day care centers. *Amos* cannot be read as holding that religious organizations may be exempted from all legislation intended to protect public health and safety.

The Illinois Court also failed to explain how requiring licensing and compliance with minimum health and safety standards will interfere with a religious institution's religious mission. It has been held many times that operating a day care center is a secular function, not the operation of a religious ministry. *Heritage Baptist Temple, Inc.*, 693 P.2d 1163; *Roloff Evangelistic Enterprises v. State of Texas*, 556 S.W.2d 856 (1977); *State of Kansas v. Heart Ministries, Inc.*, 607 P.2d 1102 (Ka. 1980); *Forest Hills Early Learning Center v. Lukhard*, 661 F.Supp. 300, 309 (E.D. Va. 1987).

B. *The Regulations do not Burden or Infringe Upon Religious Liberty.*

The Illinois Child Care Act and regulations are religiously neutral, and neither purport to, nor do they in fact, regulate or affect religious teaching or doctrine. For example, Section 7 of the Act, Chapter 23, §2217(e) provides that any standards involving medical treatment shall include appropriate exemptions for children whose parents object on the grounds that they conflict with the tenets and practices of a recognized church or religious organization. The regulations reserve to the individual

center the decision as to whether to include formal religious observance or instruction (89 Ill. Admin. Code, Ch. III, §407.8(c)(2)(J) (1985)); reserve to the person having custody, whether the child should participate in religious instruction (89 Ill. Admin. Code, Ch. III, §407.18(a)(4)(B)) and include among its regulations a provision which calls upon the center to respect a special diet required by a child due to his or her religious beliefs. 89 Ill. Admin. Code, Ch. III, §407.24(j)(1985). In other words, the regulations pose no threat to private religious liberty, since they neither proscribe religious content, nor limit the scope of that content in any day care program under their aegis. *See, State of Texas v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692, 695 (Tex. 1985), App. Dism. 474 U.S. 801 (1985), where the court upheld the validity of a statute requiring religious day care to be licensed, and stated that their exemption from licensing would violate the Fourteenth Amendment's guarantees of equal protection.

If a particular regulation or standard is allegedly interfering with a religious doctrine or belief, then the religious institution should be made to prove that the belief is central to the religion, sincerely held, and that the state regulation is not the least intrusive means of providing for the health, safety and welfare of the child enrolled in such religious center. *Heritage Baptist Temple, Inc.*, 693 P.2d 1163 (Ka. 1985); *Heart Ministries, Inc.*, 607 P.2d 1102; *Roloff*, 556 S.W.2d 856. They must also prove beyond any doubt that the state's compelling interest in safeguarding the health and welfare of children is outweighed by the burden of the regulation on the practice of religion. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Absent such proof, the regulation must prevail.

C. *Exemption Increases Government Entanglement.*

The Illinois Supreme Court, without analysis or discussion, found that the exemption will tend to avoid rather than foster governmental entanglement with religion. *Pre-School*, 119 Ill.2d 268, 518 N.E.2d 1018, 1024 (1988). Many courts have held that a mere assertion by the legislature, or by lay or secular proponents, that the statutory exemption was enacted for the

purpose of avoiding interference or infringement with the free exercise of religion, will not suffice to validate such legislation. *Forest Hills Early Learning Centers, Inc. v. Lukhard*, 728 F.2d 230, 240 (4th Cir. 1984). If the contrary view were permitted to prevail, it would effectively immunize legislation from constitutional challenge in the courts.

> [J]udicial deference to legislative recognition of Constitutional rights cannot be thought to run that far. See, e.g., *Thomas Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 193, 66 L.Ed.2d 199 (1980) (Judicial inquiry must go back of state's testimonial avowal of secular purpose); *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963)(Same); *Karen B. v. Treen*, 653 F.2d 897, 900 (5th Cir. 1981), Aff'd. 455 U.S. 913 (1982) (Same).

Id. at 240.

No case has yet held that religious institutions are entitled to a blanket exemption from compliance with an entire statutory or regulatory scheme of this kind. Allowing such an exemption to stand would be precedent for and an invitation to associations of nursing homes, hospitals, sanatoria, or homes for the elderly operated by religious institutions to seek exemption from their resident state's regulatory framework.

Finally, it is clearly evident that non-licensure increases the risk of governmental entanglement. The language of the statute requires that in order to qualify for an exemption, a religious institution (a) must receive no governmental aid, (b) its day care center must be operated as a component of its religious, non-profit elementary school, (c) its school and day care center must be operated primarily to provide religious education, and (d) must qualify as a Section 501(c)(3) organization. Ill. Rev. Stat., Ch. 23, §2212.09(i) (1983). Therefore, in order to determine whether a religious institution qualifies for the exemption, the DCFS must satisfy itself that the institution meets all of the above requisites. In order to do so, the DCFS must: (a) make a comprehensive examination of the institution's financial records; (b) audit the program of the day care center and elementary program to

determine whether each is a component of the other; (c) examine the curriculum and program to determine if they are primarily religious, and (d) probably the most objectionable inquiry to religious institutions, determine what is religious and what is not. On the other hand, if religious institutions were required to be licensed and regulated as other day care centers, there is no examination to determine whether governmental aid is received, nor is an audit of the institution's financial records conducted, nor will the DCFS have the right to examine the religious aspects of the curriculum or inspect the religious elementary schools' and day care centers' curriculum in order to determine if they are components of each other's programs.

D. *Exemption Advances Religion.*

Exemption advances and strongly advantages day care centers operated by religious institutions, as they are directly relieved of significant financial and administrative burdens which compliance would engender.

By reason of Section 2.09(i), religious institutions are entirely relieved from the substantive requirements which are imposed upon non-exempt centers. They do not have to provide a minimum square-foot area per child, nor are they required to provide nutritious meals. They may combine age groups, and have groups of any size and configuration, supervised or unsupervised, and if supervised, employ an untrained individual with little or no child care experience or education. Health and hygiene requirements for children may be non-existent, and the children may or may not, in the sole discretion of the religious institution, have play equipment or games with which to occupy the sometimes 12 to 14-hour days at the centers. Nor are religious institutions required to carry liability insurance. Further, by virtue of not being subject to regulation, teachers and other staff members hired by religious institutions will not have their credentials and employment histories examined for prior child or sexual abuse complaints, as are all prospective employees of licensed centers. Child Care Act, Ch. 23, §2214 (1987).

In an Affidavit made by William-D. Geer, Vice President of the Illinois Association of Non-Public Schools, the motivation of

their intervention is exposed and laid bare – they won't, or can't, spend the money to provide a safe, healthy and nurturing environment for the children who are so trustingly, and perhaps naively, placed in their care. Mr. Geer said:

* * * *

> 5. ... [A]pproximately 100 percent of the group mentioned in paragraph 4 above would fall into *immediate non-compliance* with current DCFS regulations
>
> 6. An estimated 90-100 percent of the group mentioned in paragraph 5 above would not be sufficiently capitalized to remain in existence and comply with the onerous requirements of said DCFS regulations and procedures. ...

Affidavit of William D. Geer, Jr. (See Appendix, pp. 164a-167a).

As Circuit Judge Curry recognized, exempting such centers renders "[s]tate licensing and tough regulations ... nothing more than a public relations ploy for the State, because they have no meaningful impact on the centers where the greatest number of toddlers attend." (See Appendix, p. 58a-59a).

In *Forest Hills*, the exemption of religious centers was quite similar to the Illinois statutory exemption, although not quite as broad. Following a comprehensive review of the Virginia child care regulations, the court said: "The plaintiffs had to do no more than hold up the challenged exemption for judicial scrutiny to demonstrate its palpable facial non-neutrality in respect of religion; ... the substantiality of degree of favor conferred upon religion in relation to non-religion is equally palpable." *Forest Hills*, 728 F.2d 230, 235.

E. *The Religious Exemption Amounts to an Endorsement of Religion.*

The religious exemption not only advances religion in the areas described above, it also tends to endorse religion in an impermissible manner.

The message of endorsement conveyed by the Illinois Child Care Act exemption conveys a dangerous misrepresentation (i.e., that day care centers operated by religious institutions are, *per se*, better and more inherently safe and secure than those operated by non-sectarian day care centers; and further, that only non-sectarian centers cannot be trusted to provide a healthy and safe environment for young children without the compulsion of legislated minimum standards). The public is, therefore, strongly encouraged by the endorsement to enroll children in religious day care centers — which already enjoy competitive advantages by reason of charitable donations and other tax exemptions.

III. EXEMPTIONS FROM REGULATION UNDER SECTIONS 2.09(b)(c)(g) AND (i) CREATE UNREASONABLE CLASSIFICATIONS.

Neither reason, sense nor logic, nor the wording of the legislation can explain the legislative exemptions of day care centers which are "recognized or accredited by recognized national or multi-state educational organization or association, or operated by a "school" registered or recognized by the State Board of Education." Ill. Rev. Stat., Ch. 23, §2212.09(b)(c)(g)(1983). In reversing the trial court's finding, the Court said that, "the legislature has "apparently" chosen to divide between the State Board of Education and the DCFS administrative responsibility over day care programs that are allied with schools and those that are not." *Pre-School*, 119 Ill.2d 268, 518 N.E.2d 1018, 1024 (1988). While acknowledging that the State Board has no regulations, the Court found that this lack of regulation "was no impediment to recognizing the validity of that classification." The Court failed to mention, however, that the regulations leave the definition of "school" undefined. Further, the court also overlooked the fact that those day care centers which are recognized or accredited by the "recognized national or multi-state educational organization or association" are not required to be "allied with elementary schools." The Court also misconstrued pertinent legislation, by inferring that the State Board of Education had authority to promulgate regulations governing these day care centers. *Id.* at 1023. In fact, there is no statutory procedure for regulation or recognition of private schools. Further, as to public

schools which seek recognition, there are no minimum requirements with respect to day care programs. 23 Ill. Admin. Code, Ch. I, §1.10-1.80 (1985). Finally, neither the Act, nor the DCFS regulations define "accredited" or "recognized" with regard to national or multi-state educational organizations, nor are there any standards or minimum requirements which must be met by these so-called associations. In fact, theoretically, virtually any one or more day care centers can organize an association, call themselves "national" or "multi-state," and under the language of the statute, be entitled to anoint day care centers with exempt status. This can only lead to a dangerous proliferation of unlicensed day care centers and homes.

A. *There is No Rational Justification for Exempting from Regulation Day Care Which Provide the Same or Similar Services to Young Children.*

The Equal Protection Clause mandates that legislative classifications be reasonably related to the legislative purpose, and that there must be a sound basis for regarding any class or classes as distinct and separate for the purpose of legislation. *Reed v. Reed*, 404 U.S. 71 (1971); *Milwaukee Montessori School v. Percy*, 473 F.Supp. 1358 (E.D. Wis. 1979); *Skinner v. Anderson*, 38 Ill.2d 455, 231 N.E.2d 588 (1967).

The Child Care Act was enacted for the purpose of safeguarding, protecting and fostering the health, safety and general well-being of all children in the State of Illinois to whom day care is provided. Ill. Rev. Stat., Ch.23, §2217 (1969). The only cases which have considered exemptions from day care licensing have declared such classifications to be invalid as violative of the Equal Protection Clause. *Milwaukee Montessori School v. Percy*, 473 F.Supp. 1358 (E.D. Wisc. 1979); *Forest Hills*, 728 F.2d 230; *Corpus Christi*, 683 S.W.2d at 695.

The standard against which legislation must be examined is whether it "bear[s] some rational relationship to a legitimate state end." *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969); (*See, also, Illinois Housing Development Authority v. Van Meter*, 82 Ill.2d 116, 119-120, 412 N.E.2d 151

(1980)). Excusing thousands of day care programs from complying with regulatory requirements enacted to protect the health, safety and welfare of children can hardly be said to be consistent with the governmental interest asserted. The Illinois Supreme Court justified the exemption by saying that "school-affiliated" centers must be presumed to have available adequate staff, facilities and experience. The Court's reasoning was fallacious on several grounds. First, as to the exemptions in subparagraphs (b) and (c) of Section 2.09, there is no requirement that the program be "school affiliated." Secondly, even if there were a requirement of school affiliation, there is no guarantee than an elementary school will have the specially-trained staff, facilities, equipment or programs which are deemed to be minimally required by the DCFS.

B. *The Exemptions Cannot be Justified on the Theory that They are in Furtherance of a Legislative Scheme Which Will Eventually Regulate All Day Care Programs.*

The Illinois court, in an off-hand manner, purports to support its ruling by indicating that the legislature "may" have chosen "to address what it perceives to be the more pressing aspects of a particular problem." *Pre-School*, 119 Ill.2d 268, 518 N.E.2d 1022 (1988). However, as originally enacted, the Child Care Act limited exemptions to public or private elementary or secondary school systems, and shopping center services where transient children were received while parents were on the premises. Ill. Rev. Stat., Ch. 23, §2308 (1957). Beginning in 1982, after more than 25 years of regulation, various special interest groups succeeded in having legislation passed which excused their day care programs from regulatory compliance. Ill. Rev. Stat., Ch. 23, §2212.09(b)(c)(g) (1983). The last exemption enacted, Section 2.09(i), was that lobbied for by associations representing various religious groups. Ill. Rev. Stat., Ch.23, §2212.09(i) (1983). As such, such exemptions cannot be sustained on the theory that they are steps in furtherance of a legislative scheme to eventually regulate all day care in Illinois. cf. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Chicago National League Ball Club v. Thompson*, 108 Ill.2d 357, 438 N.E.2d 1245 (1985). As Judge Curry pointed

out, the state "having once occupied the entire field and regulated all or virtually all day care centers (cannot justify) the 1983 amendments ... under those cases which state that a state may enter a new field of regulation cautiously and attempt to have an impact on less than the entire problem." (See Appendix, p. 56a).

Therefore, granting exemption invites formerly regulated and now newly-exempt facilities to lower their standards and, contrary to the purpose of the Child Care Act, jeopardizes rather than safeguards the health and safety of the children they are responsible to serve.

IV. SECTION 407.10(C) VIOLATES DUE PROCESS OF LAW.

The net effect of §407.10(c) is that an individual who is employed or associated with a day care center who has been accused of an incident of child or sexual abuse, or neglect, must be discharged or otherwise separated from the center without having been afforded any of the requisites of procedural due process. The regulation fails to provide for notice to the accused or a pre-termination hearing as a condition precedent to the discharge, and the action of discharge must be summarily executed.[1] Nor does the regulation provide for a prompt post-termination hearing. The DCFS can drag its investigation for up to 60 days, and if the DCFS finds any "credible evidence," the accused is "indicated." Ill. Rev. Stat., Ch. 23, §2053 (1980). Only then may the accused request a hearing, which need not be scheduled within any specified time limit. During this entire time, the accused child care worker is prohibited from working in child care, or having any contact whatsoever with children. Ill. Rev. Stat., Ch. 23, §2057.16, 2057.19 (1980).

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[1] It is important to recognize that a substantial number, perhaps a strong majority, of such incidents are initiated by the making of anonymous oral reports to the state's "child abuse hotline," often related by hysterical parents who may have been told a somewhat unintelligible story by a very young child; the identity of the reporter is confidential and, if disclosed, the reporter is protected from liability by statutory immunity. Ill. Rev. Sat., Ch. 23, §2059 (1985).

Notwithstanding the lack of a definition or other guide with respect to the meaning of the term "credible evidence," the Illinois Supreme Court held that §407.10(c) was not unconstitutionally vague.

The Fourteenth Amendment protects the right of an individual to pursue a lawful business or occupation, and said right cannot be deprived without due process of law. U.S. Const., Amend. XIV; Ill.Const. 1970, Art. 1 and 2. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319.

This Court has consistently held that some form of hearing is required before an individual may be deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 319.

In *Mathews v. Eldridge*, this Court stated that only under certain limited circumstances may a pre-termination hearing not be required. *Mathews v. Eldridge*, 424 U.S. 335 (1976). In considering which circumstances will permit this exception, the Court said that three factors must be weighed and considered as follows:

> 1. The private interest that will be affected by the official action;
>
> 2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;
>
> 3. The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319.

A. *The Private Interest of an Individual in Pursuing a Chosen Profession and in Avoiding the Stigma of Termination by Reason of a Public Accusation of Child Abuse is Great.*

It is axiomatic that any individual pursuing a profession or occupation has a substantial interest in maintaining his employment within that profession, and in avoiding the stigma and damage to his reputation which would necessarily follow a termination by reason of a child abuse accusation. In this highly sensitive and delicate profession, one's reputation and the concomitant ability to continue in one's chosen vocation or business would be severely jeopardized, if not totally destroyed, by a discharge from employment, or a forced separation from one's own business premises as a consequence of an accusation of child or sexual abuse.

B. *The Possibility of Erroneous Deprivation is Great.*

The Abused and Neglected Child Reporting Act provides that any person may make a report of child or sexual abuse to the Division of Child Protection. Certain persons are required to report suspected cases to the DCFS, and any person who is required to report and fails to do so is guilty of a Class A misdemeanor. Ill. Rev. Stat., Ch.23, §2054.02 (1986). The accuser may be a young child, a vindictive parent, or a parent who is desirous of transferring the blame for his or her own conduct. Due process requires an opportunity to confront and cross-examine adverse witnesses where important decisions turn on questions of fact. This is even more important where the evidence consists of the testimony of individuals whose memories might be faulty or who might be perjurers or persons motivated by malice, vindictiveness, intolerance, or prejudice. *Goldberg v. Kelly*, 397 U.S. 270. Neither §407.10(c), nor the Abused and Neglected Child Reporting Act provide any such safeguards.

V. THE CONTINUED ENFORCEMENT OF VAGUE REGULATIONS INVITES REPEATED DUE PROCESS DEPRIVATIONS.

There are two primary concerns addressed by the void-for-vagueness doctrine. The first concern addresses the sufficiency of notice provided by the statutory language. The second concern addresses the possibility of arbitrary law enforcement, because the statute provides insufficient guidance to law enforcement officials. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

"A statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process." *Connally v. General Construction Co.*, 269 U.S. 385 (1925).

In *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 283, 284 (1870), the Illinois court had occasion to consider a penal statute regarding child care. The court said:

> "What is proper parental care?" The best and kindest parents would differ, in the attempt to solve the question. No two scarcely agree; and when we consider the watchful supervision, which is so remitting over the domestic affairs of others, the conclusion is forced upon us, that there is not a child in the land, who could not be proved by two or more witnesses to be in this sad condition.

The arguments which can be made against the DCFS regulations are strikingly similar to those discussed by the *O'Connell* court. Who could agree as to whether a staff member is "emotionally mature" or exhibits "flexibility and patience." (§407.10(a)(1)(4)). As the *O'Connell* court stated, "no two scarcely agree," and there is not a child care worker in the State who could not be proved, by two or more DCFS investigators, to be deficient in the above requirements.

Should a pre-school owner or teacher be subject to fine, imprisonment or loss of license because a particular DCFS investigator determines that a staff member (a) does not have "the skills and competence necessary to contribute to each child's physical, intellectual, personal, emotional, and social development" (§407.10(a)); (b) is lacking in "emotional maturity" (§407.10 (a)(1)); or is not willing to cooperate with "aims" of the facility, or whose presence is "detrimental" to the group (§407.18(e)(4)); (d) that discipline is not "developmentally related or is out of proportion to the particular inappropriate behavior" (§407.19(a)(3)); or that discipline is not related to the child's act, or is handled with a "prolonged" delay? How many different toys would satisfy the requirement of "a variety?" (§407.27(f)(4)). What characteristics differentiate one toy from another in order to be considered as two separate kinds? How "large" or "small" must building blocks be to satisfy a licensing representative? (See Appendix, pp. 63a-66a).

VI. CONCLUSION.

For these reasons, the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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APPENDIX

DAY CARE LICENSING REGULATIONS & EXEMPTIONS 50-STATE SURVEY

Statute	Exemptions	Pub./Pvt. and/or Paroch. Sch. Exemptions
ALA.CODE		
2§ 38-7-2	§ 38-7-3	Yes
ALASKA STAT.		
§ 44.47.310	None Listed	N/A
ARIZ.REV. STAT.ANN.		
§ 36-881	§ 36-884	Yes
ARK.STAT.ANN.		
§ 83-901	§ 83-902(D)	Yes

Statute	Exemptions	Pub./Pvt. and/or Paroch. Sch. Exemptions
CAL. Health Safety Code § 1596:70 (West)	§ 1596-792, 807	Yes
COLO.REV.STAT. § 26-6-101	None Listed	N/A
CON.GEN.STAT. § 19a - 77	§§ 19a - 77(d)	Yes
DEL.CODE ANN. D.C.A. 31 § 390	None Listed	N/A
D.C.CODE ANN. § 3-301	None Listed	N/A

Statute	Exemptions	Pub./Pvt. and/or Paroch. Sch. Exemptions
FLA.STAT.ANN.		
§ 402.302	§ 402.302(4)	Yes
GA CODE ANN.	This section only covers mentally retarded individuals	
§ 88-2801		N/A
HAW.REV.STAT.		
§ 346-16	§ 346-19.5	Yes
IDAHO CODE		
§ 39-1211	§ 39-1211(4)	No
ILL.REV.STAT.		
Ch.23, § 2211	§ 2212.09	Yes

Statute	Exemptions	Pub./Pvt. and/or Paroch. Sch. Exemptions
IND.CODE ANN. § 12-3-2 (Burns)	§ 12-3-2-3.5	Yes
IOWA CODE § 237A	§ 237A.1(7)	Yes
KAN.STAT. ANN.1003 § 39-1006	None Listed	N/A
KY.REV.STAT. ANN. § 199.89	§ 199.894(3)	No
LA.REV.STAT. ANN. § 46:1403	None Listed	N/A

Statute	Exemptions	Pub./Pvt. and/or Paroch. Sch. Exemptions
MA.REV.STAT. ANN. M.R.S.A. 22 § 8301	§ 8301	Yes
MD CODE ANN. § 14-101	None Listed	N/A
MASS ANN.LAWS ALM BL Ch. 28 § 9	§ 9	Yes
MICH.COMP. LAWS.ANN. § 722.111	§ 722.111(e)	No
MINN.STAT.ANN. § 245.782	§ 245.791	Yes

Statute	Exemptions	Pub./Pvt. and/or Paroch. Sch. Exemptions
MISS.CODE ANN.		
§ 43-20-5	§ 43-20-5(a)	Yes
MO.REV.STAT.		
§ 210.201	§ 210.211	Yes
MONT.CODE ANN.		
§ 53-4-501	§ 53-4-501(b)	Yes
NEB.REV.STAT.		
§ 71-1902	None Listed	N/A
NEB.REV.STAT.		
§ 448.020	None Listed	N/A
N.H.REV.STAT. ANN.		
Ann. § 170-E	§ 170-E:2	Yes

Statute	Exemptions	Pub./Pvt. and/or Paroch. Sch. Exemptions
N.J.REV.STAT. ANN. 30:5B-3(West)	§ 30:5B-3(b)	Yes
N.M.STAT.ANN. § 32-1-15	N/A	N/A
NY EDUC.LAW § 4001	§ 4001(2)	Yes
N.C.GEN.STAT. § 110-86	§ 110-86(3)	Yes
ND CEN.CODE Ann. § 50-11.1-01	§ 50-11.1-02(5)	Yes
OHIO.REV. CODE ANN. § 5104.01	§ 5104.02(B)(C)	Yes
OKLA.STAT. TIT.10 10 § 402	§ 403	Yes
OR.REV.STAT. § 418.205	None Listed	N/A
PURSON´S PA. STAT.ANN. § 2201	§ 2203	Yes
R.I.GEN.LAWS § 40-13.1-1	None Listed	N/A

Statute	Exemptions	Pub./Pvt. and/or Paroch. Sch. Exemptions
S.C.CODE ANN.		
§ 20-7-2700	§ 20-7-2700(B)	Yes
S.D.CODIFIED LAWS		
§ 26-6	§ 26-6-14.2	No
TENN.CODE ANN.		
§ 14-10-101	§ 14-10-127	Yes
TEX.CODE ANN.		
§ 42.041	§ 42.041(b)	Yes
UTAH CODE ANN.		
§ 55-9-1	§ 55-9-1(2)	Yes

Statute	Exemptions	Pub./Pvt. and/or Paroch. Sch. Exemptions
VT.STAT.ANN. TIT.33 § 2852	§ 2852(b)	Yes
VA.CODE ANN. § 63.1-195	§ 63.1-195	Yes
WASH.REV.CODE § 74.15.020	§ 74.15.020(4)	Yes
W.VA.CODE § 49-2B-2	§ 49-2B-3(c)	Yes
WIS.STAT.ANN. 48-65(West)	48-75(b)	Yes
WYO.STAT. § 14-4-101	§ 14-4-102(b)	No

ABUSED AND NEGLECTED CHILD REPORTING ACT

2053. Definitions

§3. As used in this Act, the context otherwise requires:

"Child" means any person under the age of 18 years, unless legally emancipated by reason of marriage or entry into a branch of the United States armed services.

"Department" means Department of Children and Family Services.

"Local law enforcement agency" means the police of a city, town, village or other incorporated area or the sheriff of an unincorporated area or any sworn officer of the

Illinois Department of State Police.

"Abused child" means a child whose parent or immediate family member, or any person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent:

a. inflicts, causes to be inflicted, or allows to be inflicted upon such child physical injury, by other than accidental means, which causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function;

b. creates a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function;

c. commits or allows to be committed any sex offense against such child, as such sex offenses are defined in the Criminal Code of 1961, as amended, and extending those definitions of sex offenses to include children under 18 years of age;

d. commits or allows to be committed an act or acts of torture upon such child; or

e. inflicts excessive corporal punishment.

"Neglected child" means any child whose parent or other person responsible for the child's welfare withholds or denies nourishment or medically indicated treatment including food or care denied solely on the basis of the present or anticipated mental or physical impairment as determined by a physician acting alone or in consultation with other physicians or otherwise does not provide the proper or necessary support, education as required by law, or

medical or other remedial care recognized under State law as necessary for a child's well-being, or other care necessary for his or her well-being, including adequate food, clothing and shelter; or who is abandoned by his or her parents or other person responsible for the child's welfare. A child shall not be considered neglected or abused for the sole reason that such child's parent or other person responsible for the child's welfare. A child shall not be considered neglected or abused for the sole reason that such child's parent or other person responsible for his or her welfare depends upon spiritual means through prayer alone for the treatment or cure of disease or

remedial care as provided under Section 4 of this Act.

"Child Protective Service Unit" means certain specialized State employees of the Department assigned by the Director to perform the duties and responsibilities as provided under Section 7.2 of this Act.

"Person responsible for the child's welfare" means the child's parent; guardian; foster parent; person responsible for the child's welfare in a public or private residential agency or institution; any person responsible for the child's welfare within a public or private profit or not for profit child care facility; or any other

person responsible for the child's welfare at the time of the alleged abuse or neglect, including but not limited to health care professionals, educational personnel, recreational supervisors, and volunteers or support personnel in any setting where children may be subject to abuse or neglect.

"Temporary protective custody" means custody within a hospital or other medical facility or a place previously designated for such custody by the Department, subject to review by the Court, including a licensed foster home, group home, or other institution; but such place shall not be a jail or other place for the detention of criminal or juvenile offenders.

"An unfounded report" means any report made under this Act for which it is determined after an investigation that no credible evidence of abuse or neglect exists.

"An indicated report" means a report made under this Act if an investigation determines that credible evidence of the alleged abuse or neglect exists.

"An undetermined report" means any report made under this Act in which it was not possible to initiate or complete an investigation on the basis of information provided to the Department.

"Subject of report" means any child reported to the central register of child abuse and neglect established under Section 7.7 of this Act and his or her parent, guardian or other person responsible who is also named in the report.

"Perpetrator" means a person who, as a result of investigation, has been determined by the Department to have caused child abuse or neglect.

2054. Persons required to report -- Medical personnel -- Privileged communications -- Transmitting false report

§4. Any physician, resident, intern, hospital, hospital administrator and personnel engaged in examination, care and treatment of persons, surgeon, dentist, dentist

hygienist, osteopath, chiropractor, podiatrist, Christian Science practitioner, coroner, medical examiner, emergency medical technician, school personnel, truant officers, social worker, social services administrator, registered nurse, licenses practical nurse, director or staff assistant of a nursery school or a child day care center, law enforcement officer, registered psychologist and assistants working under the direct supervision of a psychologist, psychiatrist, or field personnel of the Illinois Department of Public Aid, Public Health, Mental Health and Developmental Disabilities, Corrections, Human Rights, or Children and Family Services, probation officer, or any other

foster parent, homemaker or child care worker having reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or a neglected child shall immediately report or cause a report to be made to the Department. Whenever such person is required to report under this Act in his capacity as a member of the staff of a medical or other public or private institution, school, facility or agency, he shall make report immediately to the Department in accordance with the provisions of this Act and may also notify the person in charge of such institution, school, facility or agency or his designated agent that such report has been made. Under

no circumstances shall any person in charge of such institution, school, facility or agency, or his designated agent to whom such notification has been made, exercise any control, restraint, modification or other change in the report or the forwarding of such report to the Department. The privileged quality of communication between any professional person required to report and his patient or client shall not apply to situations involving abused or neglected children and shall not constitute grounds for failure to report as required by this Act. In addition to the above person required to report suspected cases of abused or neglected children, any other person may make a report if such

person has reasonable cause to believe a child may be an abused child or a neglected child. Any person who enters into employment on and after July 1, 1986 and is mandated by virtue of that employment to report under this act, shall sign a statement on a form prescribed by the Department, to the effect that the employee has knowledge and understanding of the reporting requirements of this Act. The statement shall be signed prior to commencement of the employment. The signed statement shall be retained by the employer. The cost of printing, distribution, and filing of the statement shall be borne by the employer. The Department shall provide copies of this Act, upon request, to all employers

employing persons who shall be required under the provisions of this Section to report under this Act.

Any person who knowingly transmits a false report to the Department commits the offense of disorderly conduct under subsection (a)(7) of Section 26-1 of the "Criminal Code of 1961."

A child whose parent, guardian or custodian in good faith selects and depends upon spiritual means through prayer alone for the treatment or cure of disease or remedial care may be considered neglected or abused, but not for the sole reason that his parent,

guardian or custodian accepts and practices such beliefs.

2054.02. Failure to report suspected abuse or neglect

§4.1. Any person required to report under this Act who has reasonable cause to suspect that a child has died as a result of abuse or neglect shall also immediately report his suspicion to the appropriate medical examiner or coroner. Any other person who has reasonable cause to believe that a child has died as a result of abuse or neglect may report his suspicion to the appropriate medical examiner or coroner. The medical examiner or coroner shall investigate the report and communicate his findings, orally within 72 hours and within 7

days in writing, to the local law enforcement agency, the appropriate State's attorney, the Department and, if the institution making the report is a hospital, the hospital.

* * * *

2057.4 Time and manner of making investigations -- Emergency services

§7.4. The Department shall be capable of receiving reports of suspected child abuse or neglect 24 hours a day, 7 days a week. If it appears that the immediate safety or well-being of a child is endangered, that the family may flee or the child disappear, or that the facts otherwise so warrant, the Child Protective Service Unit shall commence an investigation immediate-

ly, regardless of the time of day or night. In all other cases, investigation shall be commenced within 24 hours of receipt of the report.

Upon receipt of a report, the Child Protective Service Unit shall make an initial investigation and an initial determination whether the report is a good faith indication of potential child abuse or neglect. If the Unit determines the report is a good faith indication of potential child abuse or neglect, then a formal investigation shall commence and, pursuant to Section 7.12 of this Act, may or may not result in an indicated report. The formal investigation shall include: an evaluation of

the environment of the child named in the report and any other children in the same environment; a determination of the risk to such children if they continue to remain in the existing environments, as well as a determination of the nature, extent and cause of any condition enumerated in such report, the name, age and condition of other children in the environment; and after seeing to the safety of the child or children, forthwith notify the subjects of the report in writing, of the existence of the report and their rights existing under this Act in regard to amendment or expungement. To fulfill the requirements of this Section, the Child Protective Service Unit shall have the capability of providing or

arranging for comprehensive emergency services to children and families at all times of the day or night.

If (a) at the conclusion of the Unit's initial investigation of a report, the Unit determines the report to be a good faith indication of potential child abuse or neglect that warrants a formal investigation by the Unit, Department, any law enforcement agency or any other responsible agency and (b) the person who is alleged to have caused the abuse or neglect is employed or otherwise engaged in an activity resulting in frequent contact with children and the alleged abuse or neglect are in the course of such employment or activity, then the Department shall

inform the appropriate supervisor or administrator of that employment or activity that the Unit has commenced a form investigation pursuant to this Act, which may or may not result in an indicated report. The Department may also notify the person being investigated, unless the Director determines that such notification would be detrimental to the Department's investigation.

* * * *

2057.12. Determination of classification of report

§7.12. The Child Protective Service Unit shall determine, within 60 days, whether the report is "indicated" or "unfounded" and

report it forthwith to the central register; where it is not possible to initiate or complete an investigation within 60 days the report may be deemed "undetermined" provided every effort has been made to undertake a complete investigation. The Department may extend the period in which such determinations must be made in individual cases for up to 30 days, but such extensions shall only be made once and only upon good cause shown.

* * * *

2057.14. Categories of classification -- Reports

§7.14. All reports in the central register shall be classified in one of three categories: "indicated",

"unfounded" or "undetermined", as the case may be. All information identifying the subjects of an unfounded report shall be expunged from the register forthwith, except as provided in Section 7.7. Identifying information on all other records shall be removed from the register no later than 5 years after the report is indicated. However, if another report is received involving the same child, his sibling or offspring, or a child in the care of the persons responsible for the child's welfare, the identifying information may be maintained in the register until 5 years after the subsequent case or report is closed.

* * * *

2057.16. Application for expungement -- Hearing -- Review under Administrative Review Law

§7.16. Within 60 days after the notification of the completion of the Child Protective Service Unit investigation, determined by the date of the notification sent by the Department, a subject of a report may request the Department to amend, expunge identifying information from, or remove the record of the report from the register. Such request shall be in writing and directed to such person as the Department designates in the notification. The Department shall disregard any request not made in such manner. If the Department refuses to do so or does not act within 30 days, the subject shall have the right to a hearing within

the Department to determine whether the record of the report should be amended, expunged, or removed on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this Act. Such hearing shall be held within a reasonable time after the subject's request and at a reasonable place and hour. The appropriate Child Protective Service Unit shall be given notice of the hearing. In such hearings, the burden of proving the accuracy and consistency of the record shall be on the Department and the appropriate Child Protective Service Unit. A court finding of child abuse or neglect shall be presumptive evidence that the report was not unfounded. The hearing shall be

conducted by the Director or his designee, who is hereby authorized and empowered to order the amendment, expunction, or removal of the record to make it accurate and consistent with this Act. The decision shall be made, in writing, at the close of the hearing, or within 30 days thereof, and shall state the reasons upon which it is based. Decisions of the Department under this Section are administrative decisions subject to judicial review under the Administrative Review Law.

* * * *

2057.19. Copies of report to subject

§7.19. Upon request, a subject of a report shall be entitled to

receive a copy of all information contained in the central register pertaining to his case. However, the Department may prohibit the release of data that would identify or locate a person who, in good faith, made a report or cooperated with a subsequent investigation. In addition, the Department may seek a court order from the circuit court prohibiting the release of any information which the court finds is likely to be harmful to the subject of the report.

* * * *

2059. Immunity from liability -- Presumption

§9. Any person, institution or agency, under this Act, participat-

ing in good faith in the making of a report, or in the investigation of such a report or in the taking of photographs and x-rays or in the retaining a child in temporary protective custody shall have immunity from any liability, civil, criminal or that otherwise might result by reason of such actions. For the purpose of any proceedings, civil or criminal, the good faith of any persons required to report, or permitted to report, cases of suspect child abuse or neglect under this Act, shall be presumed.

AMENDMENT I
Freedom of Religion

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

* * *

AMENDMENT XIV -- CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PRE-SCHOOL OWNERS ASSOCIATION OF ILLINOIS, an Illinois not-for-profit corporation; BURTON D. MILLER, and CROSS-ROADS CAMPUS, INC., an Illinois corporation,	
Plaintiffs,	
v.	84 CH 6980
STATE OF ILLINOIS, DEPARTMENT OF CHILDREN & FAMILY SERVICES, and GORDON JOHNSON, its Director,	
Defendants.	

EXCERPT OF THE REPORT OF PROCEEDINGS had in the above-entitled matter, before the Honorable RICHARD L. CURRY, Judge of said court, on Thursday, the 13th day of

February, 1986, at the hour of 11:00 a.m.

PRESENT:

MR. ALAN E. SOHN,
appeared on behalf of the Plaintiffs;

HON. NEIL F. HARTIGAN, Attorney General, State of Illinois, by: MR. MOSHE JACOBIUS, Assistant Attorney General,
appeared on behalf of the Defendants.

Elizabeth M. Kurtz
Official Court Reporter
Chancery Division
Circuit Court of Cook County

* * * * * * * * * * *

THE COURT: Thank you very much, counsel.

As I indicated when we commenced, I have had the opportunity to review with

considerable interest the extensive and scholarly briefs filed by counsel for each side of this dispute. I had the opportunity to acquaint myself with the language of the Act and read the regulations. I have reviewed the affidavits on this side and then the affidavits on that side, and I have now had the advantage of your oral arguments for the last hour and a half.

The following comments shall represent my findings of fact and my conclusions of law, and they shall stand and be made part of any order that is presented in this cause. No order will be entered without the transcribed findings of fact and conclusions of law attached thereto.

The Child Care Act was first enacted in 1969 providing for licensing and regulatory requirements applied broadly to establishments, facilities, and programs coming within the definition of a day-care center. In 1983 the General Assembly passed an amendment to Section 209 of the Act which provided extensive exemptions from the licensing and regulatory requirements by excluding nine categories of programs from the definition of day-care center.

The Act now exempts in part programs operated by public or private elementary school systems or secondary level school units or institutions of higher learning. It exempts programs which are recognized by the State Board of Education. It exempts programs which are operated by a school which is registered with the

State Board and which is recognized or accredited by a recognized national or multistate educational organization. It exempts special activities, programs conducted by civic, charitable and governmental organizations. It exempts part day-care facilities. It exempts that portion of programs which are operated by churches and religious institutions as a component of a religious not-for-profit elementary school.

It's these exemptions that the plaintiffs challenge. The plaintiffs are a private preschool operators association and the owner/operator of a licensed day-care center who enjoy no exempt status and therefore continue to be licensed and regulated under the 1983 modifications to the Act. These plaintiffs bring this action to challenge the

constitutionality of the exemptions as violating equal protection and due process; as aiding the establishment of religion and as special legislation.

Plaintiffs also attack the provisions found in selective sections of the regulation as being void for vagueness. Unlike elementary and secondary education, attendance at day care is not mandated by state law. Day-care programs come in many forms. But regardless of the form, attendance is voluntary. In the recognition of the large number of children of preschool age who are attending day-care facilities across the state and in keeping with its duty to look after the health, safety and welfare of its citizens, the state legislature has prescribed certain minimum standards to be met by those

facilities where preschool children are in regular attendance and has further imposed licensing requirements on them.

The economics of the marketplace plays a large role in where a child will be enrolled for day care. Some facilities provide extensive programs to develop coordination, to commence the learning experience, to teach interaction and social graces, to provide little challenges which stimulate intellectual growth. Other facilities provide few, limited or none of the above. It is the parent who makes the decision on which kind of day-care school to place his or her child, and economics plays no small part in that decision.

The State's interest is not in the educational or vocational component of either center, that is, the center where there is extensive programming or the center where there is little programming. The State's interest is in the safety, cleanliness, heat and ventilation, adequacy of space for population enrolled, staff-to-child ratio, and the qualifications of those in charge of the children. If food is served, the State has an interest in its quality and preparation.

It's common knowledge that some children are sent to day-care centers out of love, and some are sent out of necessity, and some are sadly sent merely to get them out of sight. Neither the State nor the facility operator has any legitimate concern as

to why the child is sent. Their concern is that the child's welfare not be endangered in any manner while he or she is in attendance. The fact that there may or may not be an educational component in the day-school program is irrelevant to the State's concern for a safe daytime haven for these little citizens.

As I said earlier, with the attendance on a voluntary basis at a time of life before the State's interest in mandatory education comes into play, the educational component in a day-care center is merely frosting on the cake. It's nice, but it's not necessary. And the State has no legitimate interest in it. To assume -- or strike that. To assure that each facility meets certain minimum standards, the State has imposed

a licensing requirement on those who choose to operate such a facility.

In addition to the license, the operator must comply with the rules and regulations of the department which proscribe standards for operation of a day-care center. As originally enacted, only two exceptions existed from the regulations of the Day-Care Act. Those were for public or private elementary or secondary school systems and shopping center services. These two, that is school systems and shopping center services, have now been expanded to the nine, a portion of which I recited earlier.

The exceptions, which have educational experience, capabilities and facilities as a common factor, seem

strongly -- strike that -- seem strangely devoid of any rational justification. With the presumed legislative justification for any day-care center regulation being health, well-fare and safety of preschool aged children, the rationale in exempting schools or school related programs and facilities is elusive at best and nonexistent at worst.

The day-care center located in a dingy basement of an institution of higher learning or in the freezing field house of a park district or in the rear pews of a church is not made more safe or appropriate for day care simply by reason of the fact that others who are older are pursuing education, crafts or religion somewhere else in the facility or because the operator is accredited and recognized as an educational pro-

vider. The educational pursuits of others and the experience of private, public or religious schools in educating and caring for school aged children is no satisfactory assurance that day-care facilities' staffs and programs will satisfy minimum safety, health and welfare needs for the preschool population that is on the site.

There simply is no correlation between the state ordered precautions for preschool children attending day-care programs and the educational capabilities of institutions such as grade schools, high schools and colleges, whether private or public. There is none which would warrant the kinds of exceptions which are now provided in Section 2.09.

Day-care centers are regulated out of the State's concern for the safety and general well-being of children before they move on to school. Intellectual stimulation of those three-, four- and five-year olds is not the basis for our licensing of day-care centers. To exempt a facility which is in fact a day-care center when measured by every known norm simply because it is operated by an entity which also operates a school system or is otherwise recognized or accredited by a national or multistate educational organization is to grant an exemption or an exception based on a totally irrational criterion.

It is the demonstrated educational capabilities which warrants the exceptions under the Act, and that capability is irrelevant to the State's primary

concern in and motivation for day-care center regulation. The reputation for excellence which a school, a school system or accredited organization may have obtained in the educational world is no guarantee that the space set aside for day care is safe or suitable or adequate for that particular need or use. The academic prerequisite established for teachers at certain schools or in certain systems does not create a presumption that their standards for a day-care attendant will be similarly high. Affiliation with a national organization is a poor substitute for compliance with standards which the department views as minimal for those centers not so affiliated.

The appropriateness, safety, cleanliness and general adequacy of the

premises which provides for the physical comfort, care and well-being of the child is in no way related to or satisfied by the mere identity of the operator as one who also must meet educational standards of some kind. There is nothing in the Act which extends the physical plant and safety requirements found in schools to the place where the school chooses to have its day-care operation.

The exemptions here are unreasonable. There is no set of facts readily apparent to the Court which could justify an exemption from safety regulations because of some academic presence in the community. If there is a potential for an evil to exist in the away-from-home environment of our day-care centers and if that evil is sufficient

to motivate the legislature to take corrective action, then that corrective action should be aimed wherever that potential may be found. There is no rational justification for a private day-care center's need to be licensed and regulated and a church or school related day-care center's claim to an exemption therefrom.

The State's brief argues, quote, "there can be little doubt that the State's interest in day-care centers is paramount," unquote. If that is so, why does the State provide a blanket exception of the kind that is found in Section 209 of the Act? The State argues that the exempt school systems or religious schools provide some kind of formalized structure or curriculum. Nothing in the Act requires such a

qualification in order to obtain the exempt status.

The State further argues that the exempted institution operates as a component of a school. My answer to that is, so what. That merely begs the question of whether the facility is safe, warm, and adequate. The safety of the child is what is at issue. A day-care center in the school's boiler room is not made safe because the day care is a component of that school. These exemptions clearly are in violation of equal protection and special legislation prohibition of our constitution.

The classifications here which demand licensing for only some of those engaged in like activities is clearly arbitrary and capricious and devoid of

any rational basis. The legislature could not reasonably or rationally have decided that a three-year old's safety, health, welfare or nutrition is adequately safeguarded away from home merely because those in charge also operate a public, private or religious school. Having once occupied the entire field and regulated all or virtually all day-care centers, the new exemptions found in the 1983 amendments cannot be justified under those cases which state that a State may enter a new field of regulation cautiously and attempt to have an impact on less than the entire problem.

Here just the opposite happened. The State occupied the entire field and now has decided to back out of more than half of it. If the plaintiffs' daycare

center is licensed and regulated because of a profound concern for the safety and well-being of Dick and Jane, then why does that concern end when Tom and Sally go to a Chicago Archdiocese day-care center or a Chicago Board of Education day-care center or the University of Chicago day-care center? What is there per se about these sponsoring organizations which would lead legislatures to exempt them from the safety regulations imposed on other operators who care for toddlers? I submit there is nothing.

The realities of the day-care picture in Illinois is that the greatest number of small tots are enrolled in day-care centers operated under the auspices of these exempt entities. This is common knowledge of which the Court can certainly take judicial knowledge or

judicial notice. The result is that Illinois has a licensing law and stringent regulations which impact only on those day-care centers which enroll the smallest percent of our kids.

The obvious reasons for these exceptions, which reasons really have nothing to do with safety or welfare, is that public, private and religious sponsors of the great majority of these centers simply can't afford to implement the kind of stringent standards which the State prescribes. Rather than drive them out of business or make the standards less oppressive the decision was simply to exempt them. State licensing and tough regulations then become nothing more than a public relations ploy for the State because they have no

meaningful impact on the centers where the greatest number of toddlers attend.

If the State is persuaded that the safety of a day-care center's programs enrollee does indeed demand a certain ratio of staff to child, that child care workers have certain minimum qualifications, that there be at least a certain amount of square foot space per child, that the temperature be maintained within a set range, then there is no rational basis upon which to exempt llike care providers simply because they have recognized educational credentials.

The State does not occupy and regulate the day-care programs when they burden some and ignore the majority. And as much as the statutory classifications set forth in the 1983 amendments

do not treat all like class members in a like fashion, it is unconstitutional under the equal protection and due process clauses of the constitution. The facial invalidity of the exemptions and their lack of any rational basis make it unnecessary to rule upon the arguments as they relate to Count 2.

Moreover as to Count 2, I think it is important to note that there is no secular purpose served by the exclusion of religious day-care centers from the State's control. I'm satisfied that the Forest Hills case establishes and stands as firm and good precedent for Illinois courts to follow in determining whether or not this exemption does indeed impact on the establishment of religion.

Count 4 is a challenge to Department rules and regulations because of void for vagueness. The Attorney General suggested that there is a severability clause in the statute and that the finding of constitutional infirmity in one provision need not impact on the others. It's reasonable and necessary, I believe, to discuss the allegations made in Count 4 as to void for vagueness. The regulations as they relate to child abuse and the procedures that are to be followed by the agency after an allegation of child abuse is made do not afford a prompt hearing at which those serious charges can be fully aired, defended and resolved.

There is nothing in the regulations which set out a reasonable and fair timetable for resolution of the charge.

This lack of a timely hearing has significant due process implications. It's apparent that the procedures set out by the regulations as they relate to the disposition of charges involving child abuse do not satisfy the Mathews v. Eldridge criteria. The sensitive rights of the child and the delicate nature of the topic must be given weight, but that weight cannot be so great that it adversely and unnecessarily impacts on the concomitant rights of others. A party charged has a right to some kind of a preliminary hearing before that person can be ordered out of his own business or out of his own employment. It's apparent that the challenged section, which is 407.7C, is void for vagueness.

MR. SOHN: That is 407.10.

THE COURT: .10. A reading of the other cited regulations in Count 4 demonstrate that they also are void for vagueness. These regulations, as pointed out by the specific enumeration contained in Count 4, are worded in such a vague and ambiguous fashion as would reasonably have different persons reading them come to differing meanings.

The affidavits submitted by the State do not assist or make these vague terms clear or certain. Those affidavits merely purport to say that the affiant understands what each vague regulation means. Those affidavits make it apparent that each affiant relegates to himself or herself the right to determine what those vague terms mean. Even people trained by schooling and experience in this field, I submit, will apply varying

meanings to directions which are as ambiguous as these regulations. Thus the regulations will or may be enforced with varying levels of stringency.

When a law is so ambiguous or so vague that reasonable people reading it may come to different meanings, it cannot stand because it is a certainty under our form of government that the law may not be what the policing officer says it is. The law must be what the lawmaking bodies say it is. The enforcement of these regulations leaves to the subjective determination of the policing authority much of what the legislature should have done for themselves.

The legislature clearly has the right to impose on the agency the

difficult assignment of formulating rules and regulations. But when those rules and regulations are drafted and because they stand with the same strength and force as law, they must be as definite and definitive as possible and they must not be left to the enforcing judgment of the policing authority. Count 4 and the sections that are set forth in Count 4 amply demonstrate that these specific provisions are void for vagueness, and no testimony need be taken on that subject. Their vagueness and their ambiguity is apparent on their face. Counsel's motion for summary judgment as to Count 4 is granted.

And by these comments, I certainly don't mean to understate the seriousness of the problem or to minimize the need to regulate a day care in an enlightened

fashion in Illinois. However, that need crosses all areas of the state and all economic levels of our citizens. When the State purports to occupy a field, it must do so at a reasonable and comprehensible fashion. It cannot license and regulate some and leave others who occupy the exact same position as it relates to this activity unlicensed and unregulated.

Counsel for the plaintiff should prepare his order which declares that summary judgment is granted as to the unconstitutionality of Counts 1, 2, 3 and 4.

* * * * * * * * * * *

(Which were the proceedings had in the above cause this date.)

Docket No. 63323 - Agenda 7 - January 1987. PRE-SCHOOL OWNERS ASSOCIATION OF ILLINOIS, INC., et al., Appellees, v. THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al., Appellants.

Decided January 19, 1988

JUSTICE MILLER delivered the opinion of the court:

The Pre-School Owners Association of Illinois, Inc., Burton D. Miller, and Crossroads Campus, Inc., brought this action in the circuit court of Cook County for declaratory and injunctive relief, challenging the constitutionality of certain provisions of the Child Care Act of 1969 (Ill. Rev. Stat. 1985, Ch. 23, pars. 2211 through 2230) (the Act) and of certain administrative regulations promulgated by the Department of Children and Family Services under authority of the Act. The trial judge granted the plaintiffs' motion for summary judgment

on counts I through IV of their eight-count amended complaint, ruling that the statutory and administrative provisions challenged in those counts were unconstitutional. The trial judge made the finding necessary for an immediate appeal of that decision (see 107 Ill. 2d R. 304(a)), and the Department and its Director, named as defendants in the action, have appealed directly to this court (see 107 Ill. 2d R. 302(a)). Several organizations - the Illinois Advisory Committee on Non-Public Schools, the Christian Law Association, and Christian Schools of Illinois - have submitted amicus briefs in behalf of the defendants.

The Child Care Act of 1969 provides for the licensing and regulation of child care facilities in the State, and

the legislature has committed that task to the Department of Children and Family Services. The Department has the responsibility for issuing, renewing, and revoking licenses for the operation of the various types of child care facilities that fall within its authority. The Act requires that the operator and the facility undergo examinations before a license may be issued (see Ill. Rev. Stat. 1985, Ch. 23, par. 2215), and in connection with that responsibility, the Department is authorized to prescribe regulations for child care facilities (see Ill. Rev. Stat. 1985, Ch. 23, par. 2217). A violation of the Act or of a departmental regulation is punishable as a class A misdemeanor. See Ill. Rev. Stat. 1985, Ch. 23, par. 2228.

In their action, the plaintiffs challenged a number of the statutory provisions and administrative regulations that are applicable to day-care centers. Plaintiff Pre-School Owners Association is an association of some 200 day-care centers in Illinois; plaintiff Burton D. Miller is the owner and operator of a day-care center, the Institute for Contemporary Education; and plaintiff Crossroads Campus, Inc., is a day-care center. In the part of the amended complaint at issue here, the plaintiffs attacked on several constitutional grounds the statutory provision that exempts certain types of day-care centers from coverage of the Act and challenged a number of the Department's regulations as violative of due process.

I

The Act exempts certain categories of day-care centers from its coverage, and in counts I and III of their amended complaint the plaintiffs contended that the statutory exemptions were invalid under the Federal and State Constitutions because they denied equal protection and constituted special legislation (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, sec. 2; art. IV, sec. 13). In count II the plaintiffs made the additional argument that an exemption for certain sectarian day-care facilities was a religious preference and therefore violated the establishment clause of the United States Constitution (U.S. Const., amend. I) as well as the comparable provision of the Illinois Constitution (Ill. Const. 1970. art. I. sec. 3). The

trial judge agreed with the plaintiffs and ruled that the statutory exemptions were invalid on the grounds asserted.

Section 2.09 of the Act (Ill. Rev. Stat. 1985, Ch. 23, par. 2212.09) defines the term "day care center" as "any child care facility which regularly provides day care for *** (1) more than 8 children in a family home, or (2) more than 3 children in a facility other than a family home." Section 2.09 also sets out the following nine exceptions to that definition:

> "(a) [P]rograms operated by public or private elementary school systems or secondary level school units or institutions of higher learning which serve children who shall have attained the age of 3 years; (b) programs or that portion of the program which serves children who shall have attained the age of 3 years and which are recognized by

the State Board of Education; (c) educational program or programs serving children who shall have attained the age of 3 years and which are operated by a school which is registered with the State Board of Education and which is recognized or accredited by a recognized national or multistate educational organization or association which regularly recognizes or accredits schools; (d) programs which exclusively serve or that portion of the program which serves handicapped children who shall have attained the age of 3 years but are less than 21 years of age and which are registered and approved as meeting standards of the State Board of Education and applicable fire marshal standards; (e) facilities operated in connection with a shopping center or service, religious services, or other similar facility, where transient children are cared for temporarily while parents or custodians of the children are occupied on the premises and readily available; (f) any type of day-care center that is conducted on federal government premises; (g) special activities programs, including athletics, crafts instruction and similar activities conducted an organized and periodic basis by civic, charitable and governmental organizations; (h) part day child care facilities, as defined in Section 2.10 of this

> Act; or (i) programs or that portion of the program which (1) serves children who shall have attained the age of 3 years, (2) is operated by churches or religious institutions as described in Section 501(c)(3) of the federal Internal Revenue Code, (3) receives no governmental aid, (4) is operated as a component of a religious, nonprofit elementary school, (5) operates primarily to provide religious education, and (6) meets appropriate State or local health and fire safety standards."

The exemptions contained in section 2.09 may be grouped, for reference, into three general categories. First, subsections (a), (b), (c), (d), and (i) exclude from coverage of the Act programs that are affiliated with schools or with institutions that come within the authority of the State Board of Education. Second, subsections (e), (g), and (h) exempt programs that operate on a short-term or temporary basis or serve a transient population. Third, subsection

(f) exempts day-care programs that are conducted on Federal government premises. The trial judge ruled that the exemptions contained in section 2.09 denied the plaintiffs equal protection and were invalid as special legislation. The trial judge also found that the separate exemption accorded to certain sectarian day-care centers in subsection (i) was an invalid religious preference under the Federal and State Constitutions.

Statutes are presumed to be constitutional, and one who challenges a provision has the burden of establishing its invalidity. (Sayles v. Thompson (1983), 99 Ill. 2d 122, 124-25.) We shall first consider whether the exemptions contained in section 2.09 deny equal protection or are invalid as

special legislation. The provision at issue here does not "implicate a suspect or quasi-suspect classification, and accordingly the appropriate standard for determining the equal protection challenge[] under the Illinois and Federal constitutions is whether the legislation bears a rational relationship to a legitimate governmental interest. (McDonald v. Board of Election Commissioners (1969), 394 U.S. 802, 809, 22 L Ed. 2d 739, 745, 89 S. Ct. 1404, 1408; Illinois Housing Development Authority v. Van Meter (1980), 82 Ill. 2d 116, 119-20.) This standard applies as well to the additional argument that the provision[] violate[s] the State constitutional prohibition against special legislation (Jenkins v. Wu (1984), 102 Ill. 2d 468, 477-78; Anderson v. Wagner (1979), 79 Ill. 2d 295, 315), for

although the guarantee of equal protection and the prohibition against special legislation are not identical, they are 'generally judged by the same standard' (Chicago National League Ball Club, Inc. v. Thompson (1985), 108 Ill. 2d 357, 368)." Bernier v. Burris (1986), 113 Ill. 2d 219, 228.

As we have noted, the legislature has chosen in section 2.09 to exempt from coverage of the Act three general categories of day-care centers: those that are operated by or in conjunction with schools or that come within the authority of the State Board of Education, those that provide a temporary or short-term service or serve a transient population, and those that are conducted on Federal government premises. The validity of the classifications drawn by

the latter two groups does not require extended discussion. It was well within the legislature's province to determine that programs serving a transient population or providing short-term or temporary care, by their very nature, did not pose the problems that prompted the decision to regulate the subject in the first place. The legislature may choose to address what it perceives to be the more pressing aspects of a particular problem. (Williamson v. Lee Optical of Oklahoma, Inc. (1955), 348 U.S. 483, 489, 99 L. Ed. 563, 573, 75 S. Ct. 461, 465; Chicago National League Ball Club, Inc. v. Thompson (1985), 108 Ill. 2d 357, 366-67.) With respect to the exemption for day-care programs conducted on Federal premises, the legislature correctly determined that State regulation would be incompatible

with the broad immunity from State regulation enjoyed by Federal installations and activities under the supremacy clause, in the absence of an expression of a contrary intent by Congress. See U.S. Const., art. VI, cl. 2; Hancock v. Train (1976), 426 U.S. 167, 48 L. Ed. 2d 555, 96 S. Ct. 2006.

The characteristic common to the remaining group of exemptions, those contained in sections 2.09(a), (b), (c), (d), and (i), is that they are operated by or in conjunction with schools or that they come directly within the authority of the State Board of Education. Several considerations are at work here. Subsections (b), (c), and (d), refer expressly to programs that are registered with or recognized by the State Board of Education. With respect

to those programs, then, the legislature has apparently chosen to divide between the State Board of Education and the Department of Children and Family Services administrative responsibility over day-care programs that are allied with schools and those that are not. That the State Board of Education has not itself promulgated a detailed set of regulations governing day-care activities is no impediment to recognizing the validity of that classification. The State Board of Education my regulate that programs in other respects, and the legislature may have believed that authority over staffing and other matters would satisfy the objections that led to regulation of day-care centers in the first place.

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Also, the legislature could determine that day-care programs that are affiliated with schools, or that come within the authority of the State Board of Education, would already have available to them the staff, facilities, and experience deemed necessary for their safe and beneficial operation. In this regard we note that the exemptions for school-related facilities are all limited to programs serving children "who shall have attained the age of 3 years" (see Ill. Rev. Stat. 1985, ch. 23, pars. 2212.09(a), (b), (c), (d), (i)) and therefore do not apply to those serving children younger than the preschool level.

In light of the classifications made by the legislature in section 2.09, we believe that Milwaukee Montessori

School v. Percy (E.D. Wis. 1979), 473 F. Supp. 1358, cited by the plaintiffs, is inapposite. That case concerned a Wisconsin statute governing day-care centers that exempted from regulation programs operated by public or parochial schools. The statute did not provide an exemption for programs operated by private, nonsectarian schools, and the statute was challenged on that ground. The district court entered an order enjoining the State officials from enforcing the statute against the plaintiff school. The court found no rational basis for exempting private, sectarian schools but not private, nonsectarian schools, and the court therefore concluded that the statute denied the plaintiffs equal protection. The statutory provision at issue here is far different. Section 2.09 of the Act

does not simply exempt sectarian programs while regulating other, similar ones. Rather, school-affiliated programs of a variety of descriptions enjoy the particular exemption. We conclude that the exemptions provided in section 2.09 do not deny equal protection or constitute special legislation. They are rationally related to the problems and concerns identified by the legislature.

In count II of their amended complaint the plaintiffs made the additional argument that the exemption accorded to sectarian day-care programs by section 2.09(i) provided a preference for religious day-care centers. The plaintiffs contended that the sectarian exemption violated the establishment clause of the Federal Constitution (U.S. Const., amend. I) and the comparable

provision of the Illinois Constitution (Ill. Const. 1970, art. I, sec. 3). The trial judge agreed with the plaintiffs and ruled that the exemption was invalid on those grounds.

With respect to both the Federal and State constitutional challenges to the sectarian exemption, the parties agree that our inquiry here must be guided by Lemon v. Kurtzman (1971), 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105. (See, Board of Education v. Bakalis (1973), 54 Ill. 2d 448, 465-66 (using Lemon test in determining validity of alleged religious preference challenged under article I, section 3, of Illinois Constitution).) Lemon provides a three-part test for determining whether a statute violates the establishment clause:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [citation]; finally, the statute must not foster 'an excessive government entanglement with religion.' [Citation.]"

Lemon v. Kurtzman (1971), 403 U.S. 602, 612-13, 29 L.Ed.2d 745, 755, 91 S. Ct. 2105, 2111.

The plaintiffs in this case contend that an invalid religious purpose is apparent in this case, and in support of that contention they point out that section 2:09(i) was enacted as a separate piece of legislation, Public Act 82-982, which took effect in 1983. The plaintiffs rely primarily on Forest Hills Early Learning Center, Inc. v. Lukhard (4th Cir. 1984), 728 F.2d 230, appeal after remand (4th Cir. 1986), 789 F.2d

295. At issue in Forest Hills was a Virginia statute that exempted only sectarian day-care centers from State regulation. In reversing a grant of summary judgment for the defendants, the Federal appeals court believed that, under the Lemon test, an invalid religious purpose was apparent in the statute. The State contended that the secular purpose of the statute was to accommodate the free-exercise rights of the exempted religious institutions, but the court termed the statute "facially overbroad" in relation to the free-exercise rights it purported to accommodate. The court believed that it was premature, however, to invalidate the exemption on the limited record before it and therefore remanded the cause so that sectarian day-care centers could intervene in support of the challenged provision.

We believe that several secular purposes are discernible in the statute at issue here, and that Forest Hills may therefore be distinguished. As we noted in discussing the plaintiffs' equal protection and special legislation arguments, the legislature could have properly found that the need for regulation by the Department was more urgent in some areas than in others and therefore could have determined to concentrate the Department's resources on those programs where the perceived need was greater. In subsection (i), the legislature has included the requirement that the program be conducted as a component of an elementary school. This suggests to us, again, that the need for regulation was considered to be less significant in those instances in which the programs were recognized or registered

with the State Board of Education or were otherwise associated with schools. Thus, although subsection (i) was enacted as a separate piece of legislation, it conforms in substantial respects to those exemptions already contained in sections 2.09(a), (b), (c), and (d).

Moreover, the Supreme Court has held that "[u]nder the Lemon analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." (Corporation of the Presiding Bishop v. Amos (1987), 483 U.S. ____, ____, 97 L. Ed. 2d 273, 283, 107 S. Ct. 2862, 2868.) Therefore, the legislature may have legitimately believed that the exemption provided in section 2.09(i) would tend

to reduce State involvement in matters of religion. In this regard, it may be noted that the exemption provided in section 2.09(i) is narrowly drawn; it is limited to day-care programs that are conducted by religious organizations claiming tax-exempt status under the Federal Internal Revenue Code, that receive no governmental aid, and that are operated primarily to provide religious education.

The exemptions in section 2.09 also satisfy the "effects" part of the Lemon test. "For a law to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence." (Emphasis in original.) (Corporation of the Presiding Bishop v. Amos (1987), 483 U.S. ____,

____, 97 L.Ed.2d 273, 283, 107 S. Ct. 2862, 2869.) A relevant consideration in making that determination is that a broad range of other, nonreligious entities enjoy the same benefit. (See Mueller v. Allen (1983), 463 U.S. 388, 397, 77 L.Ed.2d 721, 729-30, 103 S. Ct. 3062, 3068.) As we have seen, section 2.09 of the Act extends exemptions to schools of various types as well as to other types of day-care centers; the sectarian day-care centers described in subsection (i) are not the sole or exclusive beneficiaries under the provision.

The third part of the Lemon test is readily satisfied in this case. The exemption will tend to avoid rather than foster governmental entanglement with religion. We conclude that section 2.09

of the Act satisfies all three parts of the Lemon test and therefore does not violate the establishment clause of the Federal Constitution or provide an invalid religious preference under the State Constitution.

II

Section 7 of the Child Care Act of 1969 (Ill. Rev. Stat. 1985, Ch. 23, par. 2217) requires the Department of Children and Family Services to establish certain minimum standards for child care facilities that fall within its authority. The Department has promulgated a comprehensive scheme for that purpose (see 89 Ill. Adm. Code 407.1 through 407.35 (1985)). The regulations were drafted by the Department with the assistance of various interested parties, who were

invited to submit testimony and written statements on proposed rules. In count IV of their amended complaint the plaintiffs challenged, on grounds of vagueness, 18 of the Department's licensing standards. The defendants submitted affidavits from child care professionals asserting that the regulations were generally understood by persons having experience in the child care filed; the plaintiffs submitted counteraffidavits disputing those views. The trial judge agreed with the plaintiffs that the challenged provisions were unconstitutionally vague on their face.

" [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning

and differ as to its application violates the first essential of due process of law." (People v. Ryan (1987), 117 Ill. 2d 28, 34, quoting Connally v. General Construction Co. (1926), 269 U.S. 385, 391, 70 L.Ed. 322, 328, 46 S. Ct. 126, 127.) A provision is facially vague only if it is vague in all its applications. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982), 445 U.S. 489, 494-95, 17 L.Ed.2d 362, 369, 102 S. Ct. 1186, 1191.

The first group of regulations challenged by the plaintiffs concern general requirements for personnel and are contained in section 407.10(a) of the Department's regulations. That section provides:

> "Staff shall generally have the skill and competence

necessary to contribute to each child's physical, intellectual, personal, emotional, and social development. Factors contributing to the attainment of this standard include:

(1) Emotional maturity when working with children.

(2) Willingness to cooperate with the aims of the facility.

(3) Respect for children and adults.

(4) Flexibility and patience.

(5) Physical and mental health which do not interfere with child care responsibilities.

(6) Good personal hygiene."

(Emphasis added.) 89 Ill. Adm. Code 407.10(a) (1985).

The plaintiffs contend that the italicized provisions are unconstitutionally vague on their face. We do not

agree. The challenged provisions, it may be noted, are criteria to be considered in determining whether staff have the necessary skill and competence. This court has previously upheld, against vagueness challenges, a statute allowing the revocation of dentists' licenses for "improper, unprofessional or dishonorable conduct" (Chastek v. Anderson (1981), 83 Ill. 2d 502, 509), as well as a statute allowing the removal of housing authority commissioners who are found to be "incompetent or guilty of neglect of duty or malfeasance" (Scott v. Department of Commerce & Community Affairs (1981), 84 Ill. 2d 42, 49-51). Expression of licensing standards in those broad terms is therefore acceptable, and we do not believe that the specific criteria listed in the regulations should undermine that.

The plaintiffs also challenge the provisions in sections 407.10(b)(1) and (b)(2) of the rules requiring that "[c]hild care staff shall demonstrate the skills to help children meet their developmental and emotional needs," and that "[c]hild care staff shall demonstrate skill in planning, directing, and conducting programs that meet the children's basic needs." (89 Ill. Adm. Code 407.10(b)(1), (b)(2) (1985).) We do not believe that those requirements are facially vague.

The plaintiffs next question the rules in sections 407.18(e)(2) and (e)(4), which concern procedures for admitting and discharging children, that "[t]he staff shall understand and consider the child's individual background and needs" and that require the

discharge of any child who "demonstrates inability to benefit *** or whose presence is detrimental." (89 Ill. Adm. Code 407.18(e)(2), (e)(4) (1985).) The plaintiffs also contest the provisions in sections 407.19(a)(3) and (a)(6) of the Department's rules that "[d]iscipline shall be developmentally related" and that "[f]irm, positive statements about or redirection of behaviors shall be the effective controlling techniques used with infants and toddlers." 89 Ill. Adm. Code 407.19(a)(3), (a)(6)(1985).

The plaintiffs also challenge a number of the regulations pertaining to the program of activity at day-care centers. The plaintiffs question regulations contained in section 407.21 (d) ("The facility shall provide a basic program of activities geared to the age

levels and developmental needs of the children served"), section 407.21(d)(2) ("A balance of active and quiet activity"), section 407.21(e) ("The daily program of the facility shall provide experiences which promote the individual child's growth and well-being and the development of self-help and communication skills, ***"), section 407.21(f)(5) ("A program that avoids long waiting periods between activities and prolonged periods during which the children must stand or sit"), section 407.21(g) ("The program shall take into account the stress and fatigue ***"), and section 40-7.21(i) ("Equipment shall be arranged in orderly, clearly defined areas of interest, with sufficient space in each area for the children to see various activities available to them"). 89 Ill.

Adm. Code 407.21(d), (e), (f), (g), (i) (1985).

Finally, the plaintiffs challenge certain regulations pertaining to toys and other play equipment. These provisions include the requirements in section 407.22 (a) that equipment and materials shall be "appropriate to the age and developmental needs of the children served," the requirement in section 407.27(f)(4) that "[a] variety of toys shall be accessible on low open shelves," and the requirements in sections 407.28(d) and (e) that indoor equipment shall be available to provide for "active and quiet appropriate to the age levels" and "developmental needs" and that outdoor equipment "appropriate to the developmental levels of the children in care shall be provided."

(89 Ill. Adm. Code 407.22(a), 407.27(f)(4), 407.28(d), (e) (1985).) The plaintiffs also question the following requirements in Appendix C of the regulations prescribing certain equipment and supplies for preschool programs: "durable large-muscle equipment," "large building blocks," "small building blocks," "durable transportation toys," "permanent equipment for dramatic play use," and "rhythm bands."

No less than a statute, an administrative regulation enjoys a presumption of validity. (Northern Illinois Automobile Wreckers & Rebuilders Association v. Dixon (1979), 75 Ill. 2d 53, 58; People ex rel. Colletti v. Pate (1964), 31 Ill. 2d 354, 359.) Most persons who have bought a child a toy or who have supervised children in their games and

other activities, it seems, would find sufficient guidance in the challenged regulations. "Where the words and phrases have a technical or special meaning commonly understood by those subject to the rule, the certainty requirement is satisfied." (Northern Illinois Automobile Wreckers & Rebuilders Association v. Dixon (1979), 75 Ill. 2d 53, 58.) It may be anticipated that a licensee or applicant will seek guidance from the Department regarding the meaning of a particular phrase or term used in the regulations. The Department's assistance in this regard is contemplated by section 7(c) of the Act (Ill. Rev. Stat. 1985, Ch. 23, par. 2217(c)), which provides:

> "The Department, in applying standards prescribed and published, as herein provided, shall offer con-

> sultation through employed staff or other qualified persons to assist applicants and licensees in meeting and maintaining minimum requirements for a license and to help them otherwise to achieve programs of excellence related to the care of children served."

Although certain of the terms listed above may not be familiar to persons who are not engaged in the child care profession, we believe that the regulations are sufficiently specific to guide the conduct of those in the field, as well as to guide the Department in reviewing facilities. We therefore hold that the remaining administrative regulations challenged by the plaintiffs in this case are not unconstitutionally vague on their face.

III

The plaintiffs also challenge, on two separate grounds, the rule set out in section 407.10(c) of the Department's regulations barring from child care employment persons who have been identified as having committed child abuse or neglect and persons awaiting trial or investigation on those allegations. The plaintiffs contend that the rule is unconstitutionally vague and, further, that it violates due process because it permits the Department to bar from child care employment persons simply on an accusation of certain offenses. The regulation in question provides:

> "No individual shall be in contact with children cared for in a day care center who, within the preceding 10 years:

> (1) Has been identified through circuit court (juvenile, criminal, civil) proceedings as having been a perpetrator of child abuse, child neglect, or child sexual abuse or though the Department's investigatory process in accordance with the Abused and Neglected Child Reporting Act (Ill. Rev. Stat. 1981, Ch. 23, pars. 2051 et seq.) as having been a perpetrator of an indicated incident of child abuse, child neglect, or child sexual abuse; or
>
> (2) is awaiting an investigative decision or trial on such charges." 89 Ill. Adm. Code 407.10(c) (1985).

We do not believe that the regulation is unconstitutionally vague. The regulation goes on to explain what court findings are encompassed in being identified through circuit court proceedings as a perpetrator of abuse or neglect.

The plaintiffs made the additional contention in count IV of their amended complaint that the rule violates due process because it does not provide for a pretermination hearing for one who has merely been accused of child abuse or neglect. The trial judge agreed, and he found the regulation invalid for that additional reason.

We believe that it is necessary to consider a question that the parties have not raised, whether the plaintiffs have standing to make this particular challenge to the regulation. To have standing, they "must have sustained, or be in immediate danger of sustaining, a direct injury as a result of enforcement of the challenged statute. Walker v. State Board of Elections (1976), 65 Ill. 2d 543, 550; People v. Mayberry (1976),

63 Ill. 2d 1,6." (Illinois Gamefowl Breeders Association v. Block (1979), 75 Ill. 2d 443, 451; see also Schiller Park Colonial Inn, Inc. v. Berz (1976), 63 Ill. 2d 499, 510-11.) The plaintiffs have not alleged that they have been subjected to the particular regulation at issue or that they are in imminent danger of harm from its operation. Accordingly, we believe that it was premature for the trial court to consider here this additional challenge to the administrative regulation.

For the reasons stated, the judgment of the circuit court is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

JUSTICE CUNNINGHAM took no part in the consideration or decision of this case.

ILL. REV. STAT., Chapter 23
Charities and Public Welfare

AN ACT in relation to the regulation of facilities for child care and to repeal an Act therein named. P.A. 76-63, approved May 15, 1969, eff. Jan. 1, 1970.

2211. Title

§1. This Act shall be known and may be cited as the Child Care Act of 1969.

* * * *

2212.05. Facility for child care, defined

§2.05. "Facility for child care" or "child care facility" means any person, group of persons, agency, association or organization, whether established for gain or

otherwise, who or which receives or arranges for care or placement of one or more children, unrelated to the operator of the facility, apart from the parents, with or without the transfer of the right of custody in any facility as defined in this Act, established and maintained for the care of children.

* * * *

2212.09. Day care center, defined

§2.09. "Day care center" means any child care facility which regularly provides day care for less than 24 hours per day for (1) more than 8 children in a family home, or (2) more than 3 children in a facility other than a family home. The term does not include (a) programs

operated by public or private elementary school systems or secondary level school units or institutions of higher learning which serve children who shall have attained the age of 3 years; (b) programs or that portion of the program which serves children who shall have attained the age of 3 years and which are recognized by the State Board of Education; (c) educational program or programs serving children who shall have attained the age of 3 years and which are operated by a school which is registered with the State Board of Education and which is recognized or accredited by a recognized national or multistate educational organization or association which regularly recognizes or

accredits schools; (d) programs which exclusively serve or that portion of the program which serves handicapped children who shall have attained the age of 3 years but are less than 21 years of age and which are registered and approved as meeting standards of the State Board of Education and applicable fire marshal standards; (e) facilities operated in connection with a shopping center or service, religious services, or other similar facility, where transient children are cared for temporarily while parents or custodians of the children are occupied on the premises and readily available; (f) any type of day care center that is conducted on federal government premises; (g) special activities

programs, including athletics, crafts instruction and similar activities conducted on an organized and periodic basis by civic, charitable and governmental organizations; (h) part day child care facilities, as defined in Section 2.10 of this Act; or (i) programs or that portion of the program which (1) serves children who shall have attained the age of 3 years, (2) is operated by churches or religious institutions as described in Section 501(c)(3) of the federal Internal Revenue Code, (3) receives no governmental aid, (4) is operated as a component of a religious, nonprofit elementary school, (5) operates primarily to provide religious, education, and (6) meets

appropriate State or local health and fire safety standards.

For purposes of (a), (b), (c), (d) and (i) of this Section, "children who shall have attained the age of 3 years" shall mean children who are 3 years of age, but less than 4 years of age, at the time of enrollment in the program.

Amended by P.A. 84-637, § 1, eff. Jan. 1, 1986.

* * * *

2214. Licenses for facilities - Application - Examination of personnel and facilities - Issuance

Text of paragraph as amended by P.A, 84-25, Art. IV, §3.

§4. Any person, group of persons or corporation who or which receives children or arranges for care or placement of one or more children unrelated to the operator must apply for a license to operate one of the types of facilities defined in Sections 2.05 through 2.19 of this Act. Application for a license to operate a child care facility must be made to the Department in the manner and on forms prescribed by it. The Department must require that each foster family home applicant, as part of the application process, authorize an investigation to determine if the applicant has ever been charged with a crime and if so, the disposition of those charges; this authorization shall

indicate the scope of the inquiry and the agencies which may be contacted. Upon this authorization, the Director shall request and receive information and assistance from any federal, State or local governmental agency as part of the authorized investigation. The Department of State Police shall provide information concerning any criminal charges, and their disposition, brought against an applicant upon request of the Department of Children and Family Services when the request is made in the form and manner required by the Department of State Police. The information derived from this investigation, including the source of this information, and any conclusions or recommendations derived from this

information by the Department shall be provided to the applicant, or his designee upon request to the Department, prior to any final action by the Department on the application. No information obtained from such investigation may be placed in any automated information system. Any criminal charges and their disposition information obtained by the Department shall be confidential and may not be transmitted outside the Department, except as required herein, and may not be transmitted to anyone within the Department except as needed for the purpose of evaluating the application. All criminal charges and their disposition information obtained by the Department shall be destroyed no

later than 60 days after the Department has made a final ruling on the application, and all rights of appeal have expired and pending appeals have been completed. The only physical identity materials which the applicant can be required to provide the Department are photographs or fingerprints; these shall be returned to the applicant upon request to the Department, after the investigation has been completed and no copy of these materials may be kept by the Department or any agency to which such identity materials were transmitted. Only information and standards which bear a reasonable and rational relation to the performance of a foster family home shall be used by the Department.

The Department shall adopt rules and regulations for the administration of this Section. Any employee of the Department who gives or causes to be given any confidential information concerning any criminal charges, and their disposition, of a foster family home applicant shall be guilty of a Class A misdemeanor unless release of such information is authorized by this Section. If, upon examination of the facility and investigation of persons responsible for care of children, the Department is satisfied that the facility and responsible persons reasonably meet standards prescribed for the type of facility for which application is made, it shall issue a license in proper form, designating on the

license the type of child care facility and, except for a child welfare agency, the number of children to be served at any one time.

Amended by P.A. 84-25, Art. IV, §3, eff. July 18, 1985.

* * * *

2214.1. Criminal background investigations

Paragraph effective July 1, 1987.

§4.1. Criminal Background Investigations. The Department shall require that each child care facility license applicant as part of the application process, and each employee of a child care

facility as a condition of employment, authorized an investigation to determine if such applicant or employee has ever been charged with a crime and if so, the disposition of those charges; this authorization shall indicate the scope of the inquiry and the agencies which may be contacted. Upon this authorization, the Director shall request and receive information and assistance from any federal, State or local governmental agency as part of the authorized investigation. The Department of State Policy shall provide information concerning any criminal charges, and their disposition, now or hereafter filed, against an applicant or child care facility employee upon request of the Department of

Children and Family Services when the request is made in the form and manner required by the Department of State Police.

Information concerning convictions of a license applicant investigated under this Section, including the source of the information and any conclusions or recommendations derived from the information, shall be provided, upon request, to such applicant prior to final action by the Department on the application. Such information on convictions of employees or prospective employees of child care facilities licensed under this Act shall be provided to the operator of such facility, and, upon request, to the employee or prospective

employee. Any information concerning criminal charges and the disposition of such charges obtained by the Department shall be confidential and may not be transmitted outside the Department, except as required herein, and may not be transmitted to anyone within the Department except as needed for the purpose of evaluating an application or a child care facility employee. Only information and standards which bear a reasonable and rational relation to the performance of a child care facility shall be used by the Department or any licensee. Any employee of the Department of Children and Family Services, Department of State Police, or a child care facility receiving confidential information under this

Section who gives or causes to be given any confidential information concerning any criminal convictions of a child care facility applicant, or child care facility employee, shall be guilty of a Class A misdemeanor unless release of such information is authorized by this Section.

A child care facility may hire, on a probationary basis, any employee authorizing a criminal background investigation under this Section, pending the result of such investigation. Employees shall be notified prior to hiring that such employment may be terminated on the basis of criminal background information obtained by the facility.

Added by P.A. 84-158, § 2, eff. July 1, 1987.

2214.2. License or employment - Eligibility

Paragraph effective July 1, 1987.

§4.2. No applicant may receive a license from the Department and no person may be employed by a licensed child care facility who refuses to authorize an investigation as required by Section 4.1.

No applicant may receive a license from the Department and no person may be employed by a child care facility licensed by the Department who has been declared a sexually dangerous person under Article 105 of the Code of Criminal

Procedure of 1963, or convicted of committing or attempting to commit any of the following offenses stipulated under the Criminal Code of 1961:

(1) murder;

(2) a sex offense under Article 11, except offenses described in Sections 11-7, 11-8, 11-12, 11-13 and 11-18;

(3) kidnapping;

(4) aggravated kidnapping;

(5) child abduction;

(6) aggravated battery of child;

(7) criminal sexual assault;

(8) aggravated criminal sexual assault;

(9) criminal sexual abuse;

(10) aggravated sexual abuse;

(11) an offense in any other state the elements of which are similar and bear a substantial relationship to any of the foregoing offenses.

Added by P.A. 84-158, § 2, eff. July 1, 1987.

2214.3. Child abuse and neglect reports

§4.3. Child Abuse and Neglect Reports. All child care facility

license applicants and all current and prospective employees of a child care facility, as a condition of such employment, shall authorize in writing on a form prescribed by the Department an investigation of the Central Register, as defined in the Abused and Neglected Child Reporting Act, to ascertain if such applicant or employee has been determined to be a perpetrator in an indicated report of child abuse or neglect.

All child care facilities as a condition of licensure pursuant to this Act shall maintain such information which demonstrates that all current employees and other applicants for employment have authorized an investigation of the

Central Register as hereinabove required.

Such information concerning a license applicant, employee or prospective employee obtained by the Department shall be confidential and exempt from public inspection and copying as provided under Section 7 of The Freedom of Information Act, and such information shall not be transmitted outside the Department, except as provided in the Abused and Neglected Child Reporting Act, and shall not be transmitted to anyone within the Department except as provided in the Abused and Neglected Child Reporting Act, and shall not be transmitted to anyone within the Department except as needed for the

purposes of evaluation of an application for licensure or for consideration by a child care facility of an employee. Any employee of the Department of Children and Family Services under this Section who gives or causes to be given any confidential information concerning any child abuse or neglect reports about a child abuse or neglect reports about a child care facility applicant, or child care facility employee, shall be guilty of a Class A misdemeanor, unless release of such information is authorized by Section 11.1 of the Abused and Neglected Child Reporting Act.

Added by P.A. 84-158, § 2, eff. Oct. 1, 1985.

2214.4. Background investigations - License applicant

§4.4. For the purpose if background investigations authorized in this Act, "license applicant" means the operator or person with direct responsibility for daily operation of the facility to be licensed. In the case of facilities to be operated in a family home, the Department may, by rule, require that other adult residents of that home also authorize such investigations.

Added by P.A. 84-158, § 2, eff. Oct. 1, 1985.

* * * *

2217. Minimum standards for licensing of facilities

§7. (a) The Department must prescribe and publish minimum standards for licensing that apply to the various types of facilities for child care defined in this Act and that are equally applicable to like institutions under the control of the Department and to foster family homes used by and under the direct supervision of the Department. The Department shall seek the advice and assistance of persons representative of the various types of child care facilities in establishing such standards. The standards prescribed and published under this Act take effect as provided in "An Act concerning administrative rules",

approved June 14, 1951, as amended, and are restricted to regulations pertaining to:

(1) The operation and conduct of the facility and responsibility it assumes for child care;

(2) The character, suitability and qualifications of the applicant and other persons directly responsible for the care and welfare of children served;

(3) The general financial ability and competence of the applicant to provide necessary care for children and to maintain prescribed standards;

(4) The number of individuals or staff required to insure adequate supervision and care of the children received;

(5) The appropriateness, safety, cleanliness and general adequacy of the premises, including maintenance of adequate fire prevention and health standards conforming to State laws and municipal codes to provide for the physical comfort, care and well-being of children received;

(6) Provisions for food, clothing, educational opportunities, program, equipment and individual supplies to assure the healthy physical, mental and

spiritual development of children served;

(7) Provisions to safeguard the legal rights of children served;

(8) Maintenance of records pertaining to the admission, progress, health and discharge of children, including, for day care centers and day care homes, records indicating each child has been immunized as required by State regulations;

(9) Filing of reports with the Department;

(10) Discipline of children;

(11) Protection and fostering of the particular religious faith of the children served.

(b) If, in a facility for general child care, there are children diagnosed as mentally ill, mentally retarded or physically handicapped, who are determined to be in need of special mental treatment or of nursing care, or both mental treatment and nursing care, the Department shall seek the advice and recommendation of the Department of Mental Health and Developmental Disabilities, of the Department of Public Health or of both Departments regarding the residential treatment and nursing care provided by the institution.

(c) The Department, in applying standards prescribed and published, as herein provided, shall offer consultation through employed staff or other qualified persons to assist applicants and licensees in meeting and maintaining minimum requirements for a license and to help them otherwise to achieve programs of excellence related to the care off children served.

(d) The Department shall prepare summaries of licensing standards. Each licensee or holder of a permit for a child care facility shall distribute a copy of the appropriate summary and any other information required by the Department, to the legal guardian

of each child cared for in that facility at the time when the child is enrolled or initially placed in the facility. The licensee or holder of a permit for a child care facility shall secure appropriate documentation of the distribution of the summary and brochure. Such documentation shall be a part of the records of the facility and subject to inspection by an authorized representative of the Department.

(e) Any standards involving physical examinations, immunization, or medical treatment shall include appropriate exemptions for children whose parents object thereto on the grounds that they conflict with the tenets and practices of a recognized

church or religious organization, of which the parent is an adherent or member, and for children who should not be subject to immunization for clinical reasons.

Amended by P.A. 84-564, § 3, Jan. 1, 1986.

* * * *

2218. Revocation or refusal to renew licenses - Grounds

§8. The Department may revoke or refuse to renew the license of any child care facility or refuse to issue full license to the holder of a permit should the licensee or holder of a permit:

(1) fail to maintain standards prescribed and published by the Department;

(2) violate any of the provisions of the license issued;

(3) furnish or make any misleading or any false statement or report to the Department;

(4) refuse to submit to the Department any reports or refuse to make available to the Department any records required by the Department in making investigation of the facility for licensing purposes;

(5) fail or refuse to submit to an investigation by the Department;

(6) fail or refuse to admit authorized representatives of the Department at any reasonable time for the purpose of investigation;

(7) fail to provide, maintain, equip and keep in safe and sanitary condition premises established or used for child care as required under standards prescribed by the Department, or as otherwise required by any law, regulation or ordinance applicable to the location of such facility;

(8) refuse to display its license or permit;

(9) be the subject of an indicated report under Section 3 of the "Abused and Neglected Child Reporting Act" or fail to discharge or sever affiliation with the child care facility of an employee or volunteer at the facility with direct contact with children who is the subject of an indicated report under Section 3 of that Act;

(10) fail to comply with the provisions of Section 7.1;

(11) fail to exercise reasonable care in the hiring, training

and supervision of facility personnel;

(12) fail to report suspected abuse or neglect of children within the facility, as required by the Abused and Neglected Child Reporting Act or

(13) fail to comply with section 5.1 of this Act.

Amended by P.A. 84-564, § 3, eff. Jan. 1, 1986; P.A. 84-936, § 1, eff. Jan. 1, 1986.

2218.1. Further grounds for revocation or refusal to renew licenses

§8.1. The Department shall revoke or refuse to renew the license of any child care facility or refuse

to issue a full license to the holder of a permit should the licensee or holder of a permit:

(1) fail to correct any condition which jeopardizes the health, safety, morals, or welfare of children served by the facility;

(2) fail to correct any condition or occurrence relating to the operation or maintenance of the facility comprising a violation under Section 8 of this Act; or

(3) fail to maintain financial resources adequate for the satisfactory care of children served in regard to upkeep of

premises, and provisions for personal care, medical services, clothing, education and other essentials in the proper care, rearing and training of children.

Amended by P.A. 83-1362, Art. III, § 2, eff. Sept. 11, 1984.

* * * *

2221. Operation of facility without license - Investigation - Report to Attorney General

§11. Whenever the Department is advised, or has reason to believe, that any person, group of persons or corporation is operating a child care facility without a license or permit, it may make an investigation to ascertain the facts. If it

finds that the child care facility is being, or has operated without a license or permit, it may report the results of its investigation to the Attorney General, and to the appropriate State's Attorney for prosecution.

2221.1. Injunction proceedings

§11.1. Upon request of the Director, the Attorney General or the State's Attorney of the county in which the violation occurred, shall initiate injunction proceedings whenever it appears that any person, group of persons, or corporation is engaged or about to engage in any acts or practices which constitute or will constitute a violation of this Act or any rule or regulation prescribed under

authority thereof. Upon a proper showing, any circuit court may enter a permanent or preliminary injunction or temporary restraining order without bond to enforce this Act or any rule or regulation prescribed thereunder in addition to the penalties and other remedies provided in this Act.

Amended by P.A. 83-1362, Art. III, § 2, eff. Sept. 11, 1984; P.A. 84-548, § 1, eff. Sept. 18, 1985.

Article III of P.A. 83-1362, the Third 82nd General Assembly Combining Revisory Act, resolved multiple actions of the 82nd General Assembly not resolved by one of the Acts of the 82nd or 83rd General Assembly.

2221.2. Closure order

§11.2. Whenever the Department expressly finds that the continued operation of a child care facility, including such facilities defined in Section 2.10, jeopardizes the health, safety, morals, or welfare of children served by the facility, the Department shall issue an order of closure directing that the operation of the facility terminate immediately, and, if applicable, shall initiate revocation proceedings under Section 9 within ten working days. A facility closed under this Section may not operate during the pendency of any proceeding for the judicial review of the decision of the Department to issue an order of closure or to revoke or

refuse to renew the license, expect under court order.

Amended by P.A. 83-1362, Art. III, § 2, eff. Sept. 11, 1984.

* * * *

2228. **Violations**

§18. Any person, group of persons, association or corporation who

(1) conducts, operates or acts as a child care facility without a license or permit to do so in violation of Section 3 of this Act;

(2) makes materially false statements in order to obtain a license or permit;

(3) fails to keep the records and make the reports provided under this Act;

(4) advertises any service not authorized by license or permit held;

(5) publishes any advertisement in violation of this Act;

(6) receives within this State any child in violation of Section 16 of this Act; or

(7) violates any other provision of this Act or any reasonable rule or regulation adopted and published by the Department for the enforcement of the provisions of this Act, is

guilty of a Class A misdemeanor and in case of an association or corporation, imprisonment may be imposed upon its officer who knowingly participated in the violation.

Any child care facility that continues to operate after its license is revoked under Section 8 of this Act or after its license expires and the Department refused to renew the license as provided in Section 8 of this Act is guilty of a business offense and shall be fined an amount in excess of $500 but not exceeding $10,000, and each day of violation is a separate offense.

In a prosecution under this Act, a defendant who relies upon the relationship of any child to himself has the burden of proof as to that relationship.

Amended by P.A. 83-1362, Art. III, § 2, eff. Sept. 11, 1984.

Section 407.10 General Requirements for Personnel

a) Staff shall generally have the skill and competence necessary to contribute to each child's physical, intellectual, personal, emotional, and social development. Factors contributing to the attainment of this standard include:

1) Emotional maturity when working with children.

2) Willingness to cooperate with the aims of the facility.

4) Flexibility and patience.

5) Physical and mental health which do not interfere with child care responsibilities.

* * * *

b) Child care staff, in addition to meeting the requirements of Section 407.10(a), shall generally demonstrate skill and competence necessary to assume direct responsibility for child care.

1) Child care staff shall demonstrate the skills to help

children meet their developmental and emotional needs.

2) Child care staff shall demonstrate skill in planning, directing, and conducting programs that meet the children's basic needs.

* * * *

c) No individual shall be in contact with children cared for in a day care center who, within the preceding 10 years:

1) Has been identified through circuit court (juvenile, criminal, civil) proceedings as having been a perpetrator of child abuse, child neglect,

or child sexual abuse or through the Department's investigatory process in accordance with the Abused and Neglected Child Reporting Act (Ill. Rev. Stat. 1981, Ch. 23, pars 2051 et seq.) as having been a perpetrator of an indicated incident of child abuse, child neglect, or child sexual abuse; or

2) Is awaiting an investigative decision or trial on such charges.

3) For the purposes of Section 407.10c) 1) identification through circuit court proceedings includes:

A) Specific findings by a court that a child's neglect or dependency is the result of physical abuse inflicted by a parent, guardian or legal custodian.

B) Criminal convictions and civil judgments regardless of the type of sentence imposed or amount of damages recovered for offenses relating to child abuse, child neglect or child sexual abuse resulting from jury trials, bench (court) trials or voluntary guilty pleas.

* * * *

e) Children shall be admitted and discharged under circumstances which ensure protection of their own and other children's physical and emotional well-being.

* * * *

2) The staff shall understand and consider the child's individual background and needs.

* * * *

4) Any child who, after attempts have been made to meet the child's individual needs, demonstrates inability to

benefit from the type of care offered by the facility, or whose presence is detrimental to the group, shall be discharged from the facility.

Section 407.19 Discipline

a) The facility staff shall use disciplinary measures designed and carried out in such a way as to help individual children develop self-control and to assume responsibility for their own acts.

* * * *

3) Discipline shall be developmentally related to the child's act and shall not be out of proportion to the particular inappropriate

behavior. The child shall be made aware of the relationship between the act and the consequences.

* * * *

6) Firm, positive statements about or redirection of behaviors shall be the effective controlling techniques used with infants and toddlers.

* * * *

Section 407.21 Program

* * * *

d) The facility shall provide a basic program of activities geared to the age levels and developmental needs

of the children served. The daily program shall be posted, and shall provide:

* * * *

2) A balance of active and quiet activity;

* * * *

e) The daily program of the facility shall provide experiences which promote the individual child's growth and well-being and the development of self-help and communication skills, social competence, and positive self-identity.

f) Program planning shall provide the following:

* * * *

5) A program that avoids long waiting periods between activities and prolonged periods during which the children must stand or sit; and

* * * *

g) The program shall take into account the stress and fatigue that result from constant pressures and stimulation of long hours in a group living situation.

* * * *

i) Equipment shall be arranged in orderly, clearly defined areas of interest, with sufficient space in each area for the children to see various activities available to them.

* * * *

Section 407.22 Equipment and Materials

a) Equipment and materials for both indoor and outdoor use shall be appropriate to the age and developmental needs of the children served. Such equipment and materials for infants, toddlers and pre-school children shall be provided in the quantity and variety specified in Appendix C (Minimum Equipment and Supplies - Pre-School Programs) and Appendix H

(Minimum Equipment and Supplies - Infant and Toddler Programs).

* * * *

f) Infants and toddlers shall be provided a daily program that is designed to meet the developmental needs of children of this age.

* * * *

4) A variety of toys shall be accessible on low open shelves for the children to use and these shall be rotated with stored toys.

* * * *

Section 407.28 School-Age Children

* * * *

d) Indoor equipment shall be available so as to provide for active and quiet play appropriate to the age levels and developmental needs of the children.

e) Outdoor equipment appropriate to the developmental levels of the children of the children in care shall be provided, including sports equipment, outdoor games and activities.

AFFIDAVIT OF WILLIAM D. GEER, JR.
From Defendants' Motion
for Leave to File Brief Amicus Curiae

STATE OF ILLINOIS)
) SS
COOK COUNTY)

AFFIDAVIT

After being first duly sworn, Affiant deposes and states as follows:

1. Affiant is a representative member of the Illinois Advisory Committee on Non-Public Schools.

2. As a representative member, Affiant is the designated Vice President of the Illinois Advisory Committee on Non-Public Schools.

3. Affiant is familiar with case number 84 CH 6980, Pre-School

Owners Association of Illinois, et al. v. State of Illinois, et al., which invalidates the exceptions outlined in Section 2.09 of the Child Care Act of 1969, Ill. Rev. Stat., Ch. 23, §2211, et seq.

4. After careful consideration of the membership list of my association or organization, as designated in Paragraph 2 above, Affiant states that approximately 40 percent of said membership operates pre-school programs which fall within the exceptions invalidated by Judge Richard Curry in matter number 84 CH 6980.

5. After due consideration of and conversations with some members, Affiant states that approximately

100 percent of the group mentioned in paragraph 4 above would fall into immediate non-compliance with current DCFS regulations should the Illinois Supreme Court affirm Judge Curry's decision.

6. An estimated 90 to 100 percent of the group mentioned in paragraph 5 above would not be sufficiently capitalized to remain in existence and comply with the onerous requirements of said DCFS regulations and procedures. The net effect of this would be that if Pre-School Owners is affirmed, this group of schools would be forced out of business if required to comply with each and every component of DCFS standards and regulations.

7. Our member organizations have a substantial interest in the outcome of the direct appeal in the Pre-School Owners case.

Further Affiant Sayeth Naught.

/s/_____

Name: William D. Geer, Jr.
Title: Vice President
Organization: Illinois Advisory Committee on Non-Public Schools

Signed and sworn to
before me this 25th
day of June, 1986.

/s/_____
Rosemarie Grant
Notary Public

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IN THE
SUPREME COURT OF ILLINOIS

PRE-SCHOOL OWNERS ASSOCIATION OF ILLINOIS, an Illinois not-for-profit corporation, BURTON D. MILLER, and CROSSROADS CAMPUS, INC., an Illinois corporation,	)
Plaintiffs-Appellees,	)
v.	)
STATE OF ILLINOIS, DEPARTMENT OF CHILDREN AND FAMILY SERVICES, and GORDON JOHNSON, its Director,	)
Defendants-Appellants.	)

NOTICE OF APPEAL

[Filed 4/12/88]

The plaintiffs-appellees, Pre-School Owners Association of Illinois, Burton D. Miller and Crossroads Campus, Inc., hereby appeal to the Supreme Court of the United States from the judgment entered in this case by the Supreme Court of Illinois on January 19, 1988.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

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Supreme Court, U.S.
FILED
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No. 87-1829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PRE-SCHOOL OWNERS ASSOCIATION OF ILLINOIS, an Illinois Not-For-Profit Corporation; **BURTON D. MILLER**; and **CROSSROADS CAMPUS, INC.**, an Illinois Corporation,

Appellants,

v.

STATE OF ILLINOIS, DEPARTMENT OF CHILDREN AND FAMILY SERVICES; and **GORDON JOHNSON**, Its Director,

Appellees.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PRE-SCHOOL OWNERS ASSOCIATION OF ILLINOIS, an Illinois Not-For-Profit Corporation; **BURTON D. MILLER**; and **CROSSROADS CAMPUS, INC.**, an Illinois Corporation,

Appellants,

v.

STATE OF ILLINOIS, DEPARTMENT OF CHILDREN AND FAMILY SERVICES; and **GORDON JOHNSON, Its Director**,

Appellees.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR AFFIRM

The Appellees, State of Illinois, Department of Children and Family Services; and Gordon Johnson, its Director, respectfully move this Honorable Court to dismiss this appeal on the following grounds:

1. The appeal is not within this Court's jurisdiction.

2. The appeal does not present a substantial federal question.

In the alternative, the Appellees move this Court to affirm the judgment of the Supreme Court of Illinois, on the grounds that it is manifest that the questions on which the decision of the cause depends are not so substantial as not to need further argument.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED BECAUSE NO FINAL JUDGMENT WAS RENDERED BY THE SUPREME COURT OF ILLINOIS AS REQUIRED BY 28 U.S.C. § 1257.

Appellants filed an eight count Amended Complaint on May 3, 1985. Count I of the Complaint challenged § 2.09 of the Child Care Act of 1969 ("the Act"), Ill. Rev. Stat. 1985, ch. 23, § 2211 et seq. which exempted certain religious and educational programs from regulation under the Act. § 2.09 provided as follows:

> "(a) [P]rograms operated by public or private elementary school systems or secondary level school units or institutions of higher learning which serve children who shall have attained the age of 3 years; (b) programs or that portion of the program which serves children who shall have attained the age of 3 years and which are recognized by the State Board of Education; (c) educational program or programs serving children who shall have attained the age of 3 years and which are operated by a school which is registered with the State Board of Education and which is recognized or accredited by a recognized national or multistate educational organization or association which regularly recognizes or accredits schools; (d) programs which exclusively serve or that portion of the program which serves handicapped children who shall have attained the age of 3 years but are less than 21 years of age and which are registered and approved as meeting standards of the State Board of Education and applicable fire marshall standards; (e) facilities operated in connection with a shopping center or service, religious services, or other similar facility, where transient children are cared for temporarily while parents or custodians of the children are

> occupied on the premises and readily available; (f) any type of day care center that is conducted on federal government premises; (g) special activities programs, including athletics, crafts instruction and similar activities conducted on an organized and periodic basis by civic, charitable and governmental organizations; (h) part day child care facilities, as defined in Section 2.10 of this Act; or (i) programs or that portion of the program which (1) serves children who shall have attained the age of 3 years, (2) is operated by churches or religious institutions as described in Section 501(c)(3) of the federal Internal Revenue Code, (3) receives no governmental aid, (4) is operated as a component of a religious, nonprofit elementary school, (5) operates primarily to provide religious education, and (6) meets appropriate State or local health and fire safety standards."

Ill. Rev. Stat., 1985, ch. 23, § 2212.09.

Appellants claimed that the exemptions violated the equal protection and due process clauses of the Fourteenth Amendment to the U.S. Constitution. In Count II, Plaintiffs challenged § 2.09 as violative of the First Amendment to the U.S. Constitution. In Count III, the same section was alleged to be special legislation in violation of the Illinois Constitution. Count IV challenged various rules adopted by the Illinois Department of Children and Family Services ("DCFS") as violative of the Fourteenth Amendment to the U.S. Constitution due to their vagueness. Also challenged was § 407.10(c) of the DCFS regulations. 89 Ill. Admin. Code, ch. III, § 407.10(c) (1985). This regulation barred from child care employment individuals identified as having committed child abuse or neglect and persons awaiting trial and investigation on these charges. Count V of the First Amended Complaint alleged that "a substantial number of the regulations promulgated by DCFS are in excess of the authority conferred upon them

by statute. . ." Count VI challenged under the Fourteenth Amendment to the U.S. Constitution the lack of procedures by which a day care center could continue to operate while challenging a license revocation at the time its license expires. Count VII challenged on due process grounds the lack of procedures by which an applicant for a license could continue to operate while challenging the failure to issue a full license. Count VIII claimed that a regulation which limited the space capacity of a day care center with infants or toddlers deprived plaintiffs of property without due process.

Citing concern for judicial economy, the trial judge only considered the first four counts of the Complaint. After finding in favor of plaintiffs on these counts and ruling that the exemptions and § 407.10(c) were unconstitutional, the trial court made a finding pursuant to Rule 304(a) of the Illinois Supreme Court Rules, Ill. Rev. Stat., 1985, ch. 110A, § 304(a). The rules permit a finding of "no just reason for delaying enforcement or appeal," when fewer than all claims have been adjudicated. A direct appeal thereafter ensued to the Illinois Supreme Court.

The Illinois Supreme Court reversed the finding of the trial court that the exemptions were violative of the First and Fourteenth Amendments. It remanded the case to the trial court to determine whether plaintiff had standing to challenge § 407.10(c) of the DCFS regulations. No final judgment was rendered by the Supreme Court of Illinois in this matter. There are still four counts pending in the state trial court, three of which raise federal constitutional challenges upon which the Illinois Supreme Court has not ruled. In addition, the remand to the trial court for a determination on the appellants' standing contemplates further proceedings which bear directly upon the constitutional issues raised by appellants.

Finality as a condition precedent to review is an historic characteristic of this Court's appellate jurisdiction. The object of this requirement has been to have the whole case and every matter in controversy decided in a single appeal. *McLish v. Roff*, 141 U.S. 661, 665 (1891). By enforcing the finality requirement, this Court is saved the needless expense, delays and labors of several successive appeals in the same case. *See id.* at 667. *See also Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985). Strict compliance with this rule also avoids premature and inappropriate adjudications of constitutional issues. Thus, the party seeking review of a state court's judgment "has the burden of affirmatively establishing this Court's jurisdiction," *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 70-71 (1948), with any doubts resolved against its exercise. *See id.*

This Court's demand in *Republic Natural Gas* for a final judgment comports with the stringent finality requirement of 28 U.S.C. § 1257. No single formula, however, can fully explain the finality doctrine. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). A final judgment usually is defined to mean "one which ends the litigation on the merits and leaves nothing for the courts to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Accordingly, appellate decisions which anticipate further state court proceedings are not considered final for purposes of this Court's jurisdiction, *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 632-33 (1981), but for a "very few" cases in which the further proceedings involve only state law issues completely dissociated from the federal issues that have been adjudicated, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975) (*quoting Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)), and a "small class" of decisions

excluded under the collateral order exception. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

In *Cox*, four categories of cases were delineated where this Court has treated as final, state court decisions on a federal issue which leave further proceedings pending in lower state courts. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 479, 483. This appeal does not fall into any of these categories.

Here, there is still a federal issue to be decided independently of the federal issues already resolved. There is no danger of later preclusion of review of the federal issues already decided by the Illinois Supreme Court. All federal issues will be reviewable in this Court at the conclusion of the state court litigation. Any ruling by this Court of federal issues already decided by the Illinois Supreme Court would have no effect on the other federal issues which are still pending in the state trial court, and could not serve to terminate the litigation.

Appellants can find no more solace in the collateral order exception to the finality doctrine than they did in *Cox*. Finality is not established merely because a major issue in the case has been decided. *See Republic Natural Gas*, 334 U.S. at 68. To justify an immediate appeal during ongoing litigation by resort to the collateral order exception, a litigant must satisfy three separate criteria. The order from which appeal is sought must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (construing *Cohen*). Appellants cannot establish these criteria.

First, the decision of the Supreme Court of Illinois did not conclusively determine a dispute issue—the alleged unconstitutionality of § 407.10(c) of the promulgated DCFS regulations. The Supreme Court of Illinois specifically declined to adjudicate the constitutionality of this regulation, but instead remanded to the trial court to determine plaintiffs' standing to challenge the provision. *Compare Parr v. United States*, 351 U.S. 513, 519 (1956) (collateral order exception does not apply when contested order decides only one part of case and thus is but a "step toward final disposition of the merits of the case" which will "be merged into a final judgment," quoting *Cohen*, 377 U.S. at 546.)

Furthermore, the constitutionality of § 407.10(c) will be reviewable at the conclusion of this litigation—whatever the ultimate factual and legal determinations are regarding plaintiff's standing to challenge this section. In *Republic Natural Gas*, this Court made clear that when only one segment of a case has been decided, the case is not "ripe for review by this Court." 334 U.S. at 72 (quoting *Collins v. Miller*, 252 U.S. 364, 371 (1920)). *Republic Natural Gas* thus reflects this Court's practice, mandated by 28 U.S.C. Section 1257, of reviewing all of the federal issues presented in a case upon conclusion of the entire litigation. *See also Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (prior dismissal of Supreme Court case did not establish law of the case or *res judicata* on points raised in first appeal; those issues thus can be raised in second request for Supreme Court review); and *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258-59 (1916) (refusal to grant *certiorari* to review interlocutory order does not, upon conclusion of case and a second petition for *certiorari*, prevent Supreme Court from reviewing issues presented in first petition).

Appellants cannot escape the finality requirement of § 1257(2). For this Court to accept appellants' plea that jurisdiction be asserted here would undermine every policy underlying the finality requirement and would neither advance the progress of this litigation nor the legitimate interests of the parties.

This litigation will not be concluded without substantial further proceedings in state court which involve the decision of additional federal questions. Absent in this case is a key factor present where this Court has made an exception to the final order requirement in the past: an assurance that the additional state court proceedings will not involve "the decision of other federal questions that might also require review by the [United States Supreme] Court at a later date . . ." *Cox*, 420 U.S. at 477.

Adhering to the finality requirement and deferring review until the litigation is concluded in the state court would allow this Court to address the constitutionality of the Illinois Child Care Act, taken as a whole, in a single appeal. This appeal should therefore be dismissed because it is not brought pursuant to a final judgment of the Supreme Court of Illinois.

II.

APPELLANTS PRESENT NO SUBSTANTIAL QUESTIONS WHICH REQUIRE REVIEW BY THIS COURT.

The federal issues which were decided by the Supreme Court of Illinois comport with well established principles set forth by this Court. There is no showing by appellants of any dispute within the circuits or of any crucial issue which requires resolution by this Court. The mere fact that many states have the religious exemption of which appellants complain is not sufficient cause for this Court

to review the questions presented by appellants. The appeal should therefore be dismissed because there are no substantial issues presented which require immediate resolution by this Court.

A. The Challenged Exemptions Are Not Violative Of The Establishment Clause Of The First Amendment.

Appellants contend that the exemptions are prohibited by the Establishment Clause of the First Amendment to the U.S. Constitution because they promote and abet religious institutions. It is well settled, however, that the government may accommodate religious practices and promulgate laws which permit churches to advance religion. *Hobbie v. Unemployment Appeals Commission of Fla.*, 480 U.S. ____, 107 S.Ct. 1046, 1051 (1987); *Corporation of Presiding Bishop v. Amos*, 483 U.S. ____, 107 S.Ct. 2862, 2868-69 (1987).

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971) this Court established a three part test to determine whether legislation violates the Establishment Clause of the First Amendment to the Constitution of the United States.

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243, 99 S.Ct. 1923, 1926, 20 L.Ed.2d 1060 (1968); finally, the statute must not foster "an excessive government entanglement with religion."

See id. at 612-13 (quoting *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 674 (1970)).

In *Amos*, this test was further elucidated and refined. Its application to the exemptions to the Act adopted by the Illinois Legislature reveals the exemptions to be lawful and not in contravention of the First Amendment.

Amos involved the constitutionality of § 702 of the Civil Rights Act of 1964 which exempted religious organizations from claims of religious discrimination. 42 U.S.C. § 2000e-1. Appellee had worked for 16 years as a building engineer for the Church of Jesus Christ of Latterday Saints. He was discharged because he could not show that he was a member eligible to attend its temples. Application of the *Lemon* test by the Court resulted in the determination that appellee could not press his religious discrimination claim against the Church. The same conclusion results here upon application of the relevant factors.

Lemon first requires a "secular legislative purpose." 403 U.S. at 612. Such a purpose is served when government alleviates "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at ____, 107 S.Ct. at 2868. Exempting sectarian day care programs from the strictures of the Act challenged here serves such a secular purpose. When these sectarian programs are exempt, the State's involvement in matters of religion is lessened. It is also relevant that the statute is narrowly drawn and only applies when the sectarian program is a component of an elementary school. *Pre-School Owners Association of Illinois, Inc. v. Department of Children and Family Services, et al.*, 119 Ill.2d 268, 280, 518 N.E.2d 1018, 1024 (1988).

Amos, teaches that the second requirement of the *Lemon* test does not mean that churches cannot advance their religion. "For a law to have forbidden 'effects' under *Lemon*, it must be fair to state that the *government itself* advanced religion through its own activities and influence." *Amos*, 483 U.S. at ____, 107 S.Ct. at 2869 (emphasis in original). There is no prohibition under the First Amendment against "lifting a regulation that burdens the exer-

cise of religion" nor is there a requirement "that the exemption comes packaged with benefits to secular entities." *See id.* There is no action that the government takes under the Act which advances religion. It is also relevant that religious day care centers are not singled out for favored treatment under § 2.09 because public and non-sectarian private day care centers which are part of a school or educational institution are also exempt. *Pre-School Owners Association*, 119 Ill.2d at 281, 518 N.E.2d at 1024-25.

There is also no risk of excessive entanglement of the state with religion as a result of the exemption to sectarian schools. Exemption avoids government involvement with church matters. "[T]he statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief" which licensing and the ensuing litigation would require. *Amos*, 483 U.S. at ____, 107 S.Ct. at 2870. Plaintiff's contention that § 209(i) will make it necessary for DCFS to determine which elementary schools are religious and which are not (see plaintiff's jurisdictional statement, p. 8) is untenable. It is not supported by any case law or any facts in the record. Under such reasoning, no exemption of any sectarian organization would ever be permissible because the government would, *ipso facto*, entangle itself with the exempt religious organization. Surely, this is not what this Court means when it speaks of "excessive entanglement."

Appellants rely primarily upon *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230 (4th Cir. 1984), *appeal after remand*, 789 F.2d 295 (4th Cir. 1986). After this Court announced its decision in *Amos*, the Fourth Circuit recently reversed itself and upheld the exemption of religiously affiliated child care centers from state licensing requirements in Virginia, based on the *Amos* ra-

tionale. *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, ____ F.2d ____, No. 87-3713 (4th Cir. May 6, 1988). The same analysis supports the constitutionality of the exemptions challenged here on First Amendment grounds.

B. The Exemptions Do Not Deprive Appellants Of Equal Protection Or Due Process.

Appellants challenge the exemption of schools and institutions that come within the authority of the State Board of Education as violative of the equal protection and due process clause. This Court has held on numerous occasions that states are given wide latitude in the regulation of their economies. *New Orleans v. Dukes*, 427 U.S. 297 (1976). Where a fundamental right or a suspect class is not implicated, the government must only demonstrate that a challenged classification is rationally related to a legitimate state interest. *See id.* 427 U.S. at 303-304. Legislatures are presumed to have acted constitutionally and statutory classifications will only be set aside if no grounds can be conceived to justify them. *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809 (1969). A legislature may act one step at a time and need not eradicate the entire evil sought to be eradicated. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955).

The Supreme Court of Illinois found that there was a rational relationship between exempting programs that are affiliated with schools and those that are not. It is rational to conclude that programs which are registered with the Illinois Board of Education or are affiliated with schools already "have available to them, the staff, facilities, and experience deemed necessary for their safe and beneficial operation." *Pre-School Owners Association*, 119 Ill.2d at 277, 518 N.E.2d at 1023. There is certainly ample

grounds upon which to justify the classifications and appellants' attempt to set them aside is unconvincing. No equal protection or due process violation can be shown by appellants based upon the challenged classifications.

C. The Regulations Promulgated By DCFS And Challenged As Unconstitutionally Vague Comport With Due Process.

Appellants challenged various regulations promulgated by DCFS as violative of due process because they were allegedly so vague that licensees were not put on notice of the DCFS requirements. The Supreme Court of Illinois carefully reviewed these terms and did not find them "so vague that men of common intelligence must necessarily guess" at their meaning or differ as to their application. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The Court pointed out that the challenged terms are sufficiently specific to guide individuals engaged in the "child care profession." *Pre-School Owners Association*, 119 Ill.2d at 286, 518 N.E.2d at 1027. The Court also noted that under the Act, individuals may seek the Department's guidance with regard to licensure requirements. *Id.* at 285, 518 N.E.2d 1027. There is no basis to conclude that the Supreme Court of Illinois erred in its assessment of ascertainability of the challenged regulations. These regulations are sufficiently precise and should be upheld.

CONCLUSION

For the foregoing reasons, the Appellees, State of Illinois, Department of Children and Family Services; and Gordon Johnson, its Director, move for dismissal of this

appeal, or in the alternative, for affirmance of the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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